142-326

RECORD, CASE No. 13,118.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 115.

MATTHEW T. GISBORN, APPELLANT,

vs.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 24, 1888.

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IN THE SUPREME COURT UTAH TERRITORY.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, A CORPORATE BODY, PLAINTIFF,

vs.

WILLIAM A. STEPHENS, AS TRUSTEE, MATTHEW T. GISBORN, ALLEN STEPHENS & CO., WILLIAM A. STEPHENS, HERMAN BLENNERHASSETT, B. F. ALLEN, HOYT SHERMAN, AS ASSIGNEE IN BANKRUPTCY OF B. F. ALLEN, BANKRUPT, AND WARREN HUSSEY, DEFENDANTS.

TRANSCRIPT ON APPEAL FROM THIRD DISTRICT COURT.
FILED MAY 6th, 1887.

E. T. SPRAGUE,
Clerk Supreme Court.

ARTHUR BROWN,
LYTTLETON PRICE,
E. B. CRITCHLOW,
Attorneys for Appellant M. T. Gisborn.

MARSHALL & ROYLE,
Attorneys for Respondent.

1 *In the District Court of the Third Judicial District of the Territory of Utah.*

TERRITORY OF UTAH, }
COUNTY OF SALT LAKE. } ss.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, A CORPORATE BODY, Plaintiff.

vs.

WILLIAM A. STEPHENS, as Trustee, MATTHEW T. GISBORN, ALLEN STEPHENS & CO., WILLIAM A. STEPHENS, HERMAN BLENNERHASSETT, B. F. ALLEN, HOYT SHERMAN, as Assignee, in Bankruptcy of B. F. ALLFN Bankrupt, and WARREN HUSSEY, Defendants.

COMPLAINT.

2 Now comes the said plaintiff, in this, the above entitled action, and complains of said defendants in said action, and alleges:

That at, and prior to, the several dates hereinafter mentioned, the said plaintiff, The Charter Oak Life Insurance Company of Hartford, Connecticut, was, has ever since continued to be, and now is, a body corporate, duly organized and incorporated, under, in pursuance of, and in conformity to the laws of the State of Connecticut.

That on the 24th day of February, A. D. 1874, Obadiah Embody, Warren D. Heaton William E. Miller and said
3 defendant Matthew T. Gisborn, as tenants in common therein, were, except as against the paramount title of the Government of the United States therein, the owners, in possession

and entitled to the possession of that certain mine and mining claim, situated in Dry Canyon, Ophir Mining District, Tooele County, Utah Territory, well and commonly known in the vicinity thereof, and elsewhere in Utah, as the Mono Silver Mine, embracing the ground hereinafter more particularly described and set out in the United States patent therefor hereinafter mentioned.

That on said 24th day of February, A. D. 1874, and whilst said Embody and said Miller and said Heaton, were, so
4 as afore said, tenants in common in said property, they, by their certain deed of bargain and sale, by them severally duly executed and acknowledged and delivered by them to said Matthew T. Gisborn, bearing date the day and year last aforesaid, duly witnessed, and which was afterwards on the . . . . . day of . . . . . A. D. . . . . duly recorded in the office of the Recorder of Deeds of said County of Tooele in book "R" of records, on pages 81 and 82, conveyed absolutely an undivided interest of two thirds parts thereof, which was all the interest they then had, of in and to said Mono Silver Mine, and other property connected therewith, set forth therein, to said defendant, Matthew T.
5 Gisborn. A certified copy of the said record, of which said last named deed, marked "exhibit A," is hereto attached, referred to, and made a part hereof.

That on the 30th day of April, A. D. 1874, said defendant, Matthew T. Gisborn, subject to the paramount title of the United States, was the owner of said Mono Silver Mine, and whilst so the owner thereof, by his certain deed, containing covenants of general and special warranty, by him duly executed and acknowledged, bearing date the day and year last aforesaid, duly witnessed and delivered to the said William A. Stephens, trustee, and
6 which was afterwards, on the 12th day of May, 1874, filed for record, and on the 23rd day of May, A. D. 1874, duly recorded in the office of the Recorder of Deeds of said County of Tooele, in book "R" of records, on pages 33, 34 and 35, conveyed to said William A. Stephens of the city of New York, in the State of New York, trustee, among other property therein named, an undivided interest of ten eighteenths (10-18) part thereof, of, in and to said Mono Silver Mine. A certified copy of which said record, of said last named deed marked "exhibit B," is hereto attached, referred to, and made a part thereof.

7 That on the 6th day of May, A. D. 1874, and whilst said defendant, Matthew T. Gisborn, subject to the paramount title of the United States, was the owner of the remaining undivided eight-eighteenths (8-18) interest of, in and to said Mono

Silver Mine, he, by his certain deed, containing covenants of general and special warranty, by him duly executed and acknowledged, bearing date the day and year last aforesaid, duly witnessed, by him duly delivered to said William A. Stephens, trustee, and which was afterwards on the . . . day of May, A. D. 1874, duly recorded in the office of the Recorder of Deeds of
8 of said County of Tooele, in book "R" of records, on pages 83 and 84, conveyed to said William A. Stephens, of the City, County and State of New York, trustee, among other property therein named, the said undivided interest of eight-eighteenths (8-18) part thereof, of, in and to said Mono Silver Mine.

A duly certified copy of which said record of said last
9 named deed, marked "exhibit C," is hereto attached, referrred to and made a part hereof.

That as, and for a part of the same transaction in which said defendant Gisborn, conveyed by said two last named deeds said Mono Silver Mine to said William A. Stephens, trustee, the said defendant, William A. Stephens, trustee, afterwards; to-wit: On the 30th day of May, A. D. 1874, by his certain declaration of trust by him duly made in writing, under his hand and seal, bearing date the day and year last aforesaid, duly witnessed and by him duly acknowledged, and by him then and there duly delivered to said defendant Gisborn, made known, declared and set out the
10 terms and conditions of the said trust, under which the said two deeds, one bearing date the 30th day of April, A. D. 1874, and the other bearing date the 6th day of May, A. D. 1874, were executed and delivered to him as aforesaid, and was received and accepted by said Gisborn as a true declaration and statement of said trust, which said declaration of trust was afterwards, to-wit: On the . . . . day of May, A. D. 1874. duly recorded in the office of the Recorder of Deeds of said County of Tooele, in book "R" of records, on pages 85, 86 and 87. A duly certified copy of which said record of declaration of trust,
11 is hereto attached, marked "exhibit D," and made a part hereof, and referred to for the full contents thereof.

That prior to the making of any of the deeds aforesaid, the said William E. Miller, Warren D. Heaton, Matthew T. Gisborn and Obidiah Embody, were, subject to the paramount title of the United States, the owners of said Mono Silver Mine, and as such owners had caused a survey thereof to be made, and in due form, and in the proper office, made application for a patent therefor, from the Government of the United States and afterwards,

12 to-wit: On the 15th day of August, A. D. 1882, there was issued to them, their heirs and assigns, in the usual form and in due form of law, a United States patent to and for said Mono Silver Mine, which was therein specifically described, as being "mineral entry No. 105, in the series of said office, designated by the Surveyor General as lot No. 46, embracing a portion of the unsurveyed public domain, in the Ophir Mining District, in the County of Tooele, and Territory of Utah, in the district of lands subject to sale at Salt Lake City, containing three and sixty-seven hundreths [3 67-100] acres of land, more or less, and according to the returns on file in the General Land Office, bounded,
13 described and platted as follows: With magnetic variation at sixteen [16°] degrees thirty [30] mins., east to-wit: beginning at corner No. 1, a post marked No. 1, lot No. 46, thence south eighty-three [83°] degrees thirty [30] mins., east sixteen hundred [1600] feet to corner No. 2 a post marked No. 2 lot No. 46, from which a fir tree seventeen inches in diameter, marked B. T., bears north seventy-one [71°] degrees, thirty [30] mins., west at a distance of twenty-one and five-tenths [21 5-10] feet, thence from said corner No. 2 north six [6°] degrees thirty mins., east,
14 one hundred [100] feet to corner No. 3, a post marked No. 3, lot No. 46, from which a fir tree seventeen [17] inches in diameter, marked B. T., bears north seventy-six [76] degrees, west, at the distance of thirteen [13] feet, and U. S. Mineral Monument No. 6, a fir tree seventeen [17] inches in diameter, marked U. S. M., No. 6 on the south side, and U. S. Mineral Monument No. 6 on a board nailed on the east side, bears north fifty-nine [59] degrees west at the distance of four hundred and sixty-two [462] feet, thence from said corner No. 3, north eighty-three [83] degrees, thirty mins., west sixteen hundred [1600] feet to corner No. 4, a post marked No. 4, lot No. 46, thence south six [6] degrees, thirty mins., west fifty feet to a point,
15 from which discovery stake bears north eighty-three [83] degrees, thirty [30] mins., west, at a distance of eight hundred [800] feet, one hundred [100] feet to the place of beginning."

That on the 16th day of September A. D. 1882, said United States patent was duly recorded in the Recorder's Office of said Recorder of said County of Tooele in book "B B" of records, on pages 632 to 636 inclusive. That under the operation and effect of said bargain and sale deed, and said warranty deeds, the said United States patent, when issued as aforesaid, fully vested the title to
16 said premises in said defendant Gisborn, and under him

in his trustee and vendee, defendant Stephens, to the extent of such interest as was created by said trust.

Plaintiff upon its information and belief further alleges, that defendants, a certain firm of co-partners, doing business at that date under the name of Allen, Stephens & Co., in April and May of the year 1874, through their agent and trustee William A. Stephens, who was also then a member of said last named firm, loaned and advanced to said defendant Gisborn the sum of four hun-
17 dred thousand dollars, for the purpose set forth in said declaration of trust; that of this amount one hundred thousand dollars was paid and advanced to said Gisborn on or about the 30th day of April A. D. 1874, and that the residue thereof was paid and advanced to said Gisborn on or about the 30th day of May A. D. 1874.

That the first amount so advanced, to-wit: Said sum of $100,000.00 was evidenced by, and to be paid according to the terms of, four certain promissory notes, each bearing date April 30th 1874, each made and executed by said defendant Gisborn by the name, style and description of M. T. Gisborn, and by one Warren Hussey, a defendant herein, each payable to said defendant Stephens, trustee, by the name, style and description of William A. Stephens
18 Esq., trustee, and to him as such trustee, then delivered by the makers thereof, each for the sum of twenty-five thousand dollars, each payable at the office of said Allen Stephens & Co., which was then in the City of New York, and bearing interest at the rate of seven per cent per annum, two of said promissory notes payable in two months, one in three months, and one in four months after the date thereof, which said promissory notes were in the words and figures following, to-wit:

19 "$25,000. NEW YORK, April, 30, 1874.

Two months after date we jointly and severally promise to pay to the order of William A. Stephens Esq., trustee, twenty-five thousand 00-100 dollars, payable at Allen, Stephens & Co's. office, N. Y., value received with seven per cent interest.

WARREN HUSSEY.
M. T. GISBORN."

"$25,000. NEW YORK, April 30, 1874.

20 Two months after date we jointly and severally promise to pay to the order of Wm. A. Stephens Esq., trustee, twenty-five thousand 00-100 dollars, payable at office of Allen

Stephens & Co., value received, with seven per cent. interest.

WARREN HUSSEY.
M. T. GISBORN."

"$25,000,00. NEW YORK, April 30, 1874.

Three months after date, we jointly and severally promise to pay to the order of William A. Stephens, Esq., trustee, twenty-five thousand 00-100 dollars, payable at the office of Allen,
21 Stephens & Co., value received, with seven per cent. per annum interest.

WARREN HUSSEY.
M. T. GISBORN."

"$25,000,00. NEW YORK, April 30, 1874.

Four months after date we jointly and severally promise to pay to the order of William A. Stephens, Esq., trustee, twenty-five thousand 00-100 dollars, payable at office of Allen Stephens & Co., value received, seven per cent. interest per annum.

22 WARREN HUSSEY.
M. T. GISBORN.

That the residue of said four hundred thousand dollars, to-wit: The sum of $300,000,00 so as aforesaid advanced on or about the said 30th day of May A. D. 1874, was evidenced by the said declaration of trust, was payable on demand, and as therein set forth bore interest according to the statement in said declaration of trust, at the rate of seven per cent. per annum from and after said 30th day of May A. D. 1874.

That the said deeds, copies of which are marked re-
23 spectively, "exhibit B," and "exhibit C," and which bear date respectively April 30th, A. D. 1874, and May 6th, 1874, the said declaration of trust, a copy of which is marked "exhibit D," (and is with said other exhibits, hereto attached) and bears date, May 30th, A. D. 1874, were made, executed and delivered as aforesaid, to secure the payment, according to the priorities and in the order set forth in said declaration of trust, of the indebtedness therein named, and which should be incurred in the execution of the terms of such trust; and among other provisions in said declaration of trust, and other indebtedness therein
24 named after providing for the payment of certain expenses, said declaration of trust provided for the payment of said indebtedness of $400,000.00 in the words and figures following, to-wit:

"2nd. To the payment to me as trustee, of the sum of four hundred thousand (400,000) dollars, advanced by me as trustee to said Gisborn, for the purchase of two-thirds undivided of said premises, from his late co-tenants, together with interest at the rate of seven (7) per cent. per annum, as follows; on $100,000 thereof, from and after the said 30th day of April, 1874, and on the
25 remaining $300,000 from and after the 30th day of May, 1874."

Plaintiff upon its information and belief further alleges that at the time of making said deed by said Gisborn, and pending the execution of said declaration of trust, and for some months prior thereto, said Mono Silver Mine had produced and yielded large quantities of very valuable mineral, running as high at one time as seventy thousand dollars per month, and that the said Allen Stephens & Co., and said William A. Stephens and said Matthew T. Gisborn all believed the said Mono Silver Mine to be of great value, and ample security for the payment of the money secured
26 to be paid in and by said declaration of trust; and so confident were said parties that all such money so secured to be paid could be easily and quickly paid from the proceeds of the workings of said mine, that as a part of said declaration of trust, provisions were inserted therein for the working of said mine as therein set forth, and for the payment of the indebtedness and sums secured by said trust, in the order therein named, by said trustee, from the issues, rents and profits of said mine, which were to be received by said trustee; and the realty itself, as well as the issues, rents and profits thereof, were to be and were, under and by said trust, to be security for the payment of the several amounts
27 in the order therein named, mentioned in said declaration of trust, and all the expenses incurred in executing said trust, including all the expenses of working said mine, a charge upon and against the property, so as aforesaid conveyed to said trustee, and upon the issues, rents and profits thereof, and to be by said trustee, satisfied from and out of the same.

Plaintiff, upon its information and belief, further alleges, that at the date of the creation of said trust, there was on said premises, so conveyed as aforesaid, a boarding house and out-buildings, also at and adjacent to the air incline, a building covering the same, and a steam engine and boilers belonging to the mine, and
28 used in working the same, and upon the vein, an incline something over 200 feet deep, well timbered and with car track therein, and that the only important working in the mine was in the line of, and on each side of said incline, upon a main

chute of ore found therein, and ores contiguous to the same; that upon the delivery of said declaration of trust, said defendant Stephens as trustee as aforesaid, entered upon and took possession of said premises, and that thereupon, the agents, to control and manage the workings of said mine, were duly appointed by said trustee,
and said Gisborn, and authorized to proceed as specified
29 in said trust; and thereupon, to-wit: At the date of
the creation of the said trust, said Stephens, as such trustee, and said Gisborn as beneficially interested in said trust, under, and in pursuance of, and in conformity to the terms of said declaration of trust, and both joining in and consenting thereto, commenced work upon said premises, the extraction of ore therefrom, and sale thereof, and by exploration of the mine for ore; that this work so commenced, continued for several years, and until the year 1878, a part of the time under agents, and managers appointed,
as set forth in said declaration of trust, and a part of the
30 time, under the supervision, consent and direction, without any intervention of agents of said trustee, and said beneficiary Gisborn, in furtherance and fulfillment of said trust. That in all the work done on said mine, and expenses incurred in working the same, and in all the indebtedness hereinafter set forth as incurred under said trust, the same was done and incurred upon consultation between and advice and agreement of said Stephens as trustee as aforesaid, and said Gisborn as beneficiary under
said trust as aforesaid, and withthe consent and approba-
31 tion of all beneficiaries under said trust, and in default of
any profits as a charge on the trust estate.

Plaintiff upon its information and belief, alleges, that from the date of the commencement of said work on said mine, under said trust, until on or about the winter of the same year, the same was prosecuted profitably and some twenty odd thousand dollars realized therefrom, and that afterwards, to-wit: In the winter of 1874, or spring of 1875, said work was continued, and in the progress thereof, what is known amongst miners as "a fault" in the vein was encountered, and the vein of ore which had been immensely rich up
to that point was there cut off by some displacement of
32 the vein, that destroyed and broke the continuity thereof,
and the mine at once ceased paying.

That it could not be known without work and further explorations, to what extent, or in what direction, the vein was displaced, and to execute the trust according to its terms, and make the issues, rents and profits primarily liable for the indebtedness secured, it became necessary to find the continuation of the vein and ore so

displaced; that during parts of the year 1875 and 1876, work on said mine was partially suspended, by reason of serious litigation in this court there pending affecting the title to a part of said
33 premises; that for a portion of the time during said last named years, and thereafter, until on or about December 1st, 1877, by the advice, and with the consent of all the parties in interest and as a necessary expense upon and charge against the said trust estate, judicious and proper work and explorations were continued upon said premises, in the effort to find said vein and ore so displaced as aforesaid, and large expenses incurred therein, and in
34 the protection of said property, consisting of the indebtedness to divers persons, now herein after set out as incurred for those purposes, and which were properly incurred for those purposes, and which were and are a charge against and upon said trust estate, in the proper and due execution of said trust; which said last named indebtedness to divers persons is numbered for identification and was as follows, and is now held and owned as follows, to-wit:

First—Plaintiff on its information and belief alleges:
35 That on or about the 9th day of May, 1876, in the said District Court of the Third Judicial District of the Territory of Utah, in the County of Salt Lake in the Territory of Utah, a judgment was duly given and made by said court in favor of Alexander T. Britton, Horace J. Grey and Willis Drummond, who were co-partners doing business under the name and style of Britton, Grey & Drummond, plaintiffs, and against said William A. Stephens, trustee, defendant, in an action in
36 said court last above named there pending, for the sum of $2,680.00.

That afterward to-wit: On the 18th day of May A. D. 1876, for value received of one John W. Simpson, said Britton, Grey & Drummond, in writing delivered to said Simpson, assigned, transferred and set over said judgment to said John W. Simpson; and that afterwards to-wit: on or about the 26th day of September A. D. 1877, the said John W. Simpson, for value received of the plaintiff herein, in writing delivered to plaintiff, assigned, transferred, and set over said judgment to this plaintiff. That no part of said judgment has been paid, and that plaintiff under said assign-
37 ment is the owner and holder of said judgment and of all legal and equitable rights thereunder.

Second—Plaintiff alleges that on the 17th day of July, A. D. 1876, in the said District Court of the Third Judicial District of the

Territory of Utah, in the County of Salt Lake, a judgment was duly given and made by said court in favor of one John W. Kerr, plaintiff, and against said William A. Stephens, trustee, and said Matthew T. Gisborn, co-partners, doing business under the firm name and style of The Mono Mining Company, defendant, therein in an action in said court last above named, then pending, for the sum of $4,313, 95-100 and costs, amounting to the sum
38 of $87.40, making in all the sum of $4,401, 35-100, that afterwards to-wit: On the 18th day of July A. D. 1876, said John W. Kerr, for value received of said John W. Simpson, in writing, delivered to said Simpson, sold, assigned, transferred and set over to said Simpson said last named judgment; and that afterwards, to-wit: On the 19th day of November, A. D. 1877, said Simpson for value received of said plaintiff herein, in writing, to this plaintiff delivered, sold, assigned, transferred and set over to this plaintiff said last named judgment. That no part of ssid last named judgment has been paid, and that plaintiff is now
39 the owner and holder under said assignment of such judgment, and of all legal and equitable rights thereunder.

Third—Plaintiff on its information and belief alleges that on or about the 21st day of April, A. D. 1877, at, to-wit: at said County of Salt Lake, an account was stated between said William A. Stephens, as trustee, as aforesaid, and one Mrs. C. L. Torbitt, and upon such statement a balance of $454.83 was found due to the said Mrs. C. L. Torbitt from said Stephens, as trustee as aforesaid. That said last named account was then and there also submitted to said defendant Gisborn, and by him, as manager for said trustee, examined and approved, as an account stated between said
40 Torbitt and said trustee, in which the sum of $454.83 was as a balance found due from said trustee to said Torbitt. That said Stephens as such trustee, agreed to pay to the said Torbitt the said balance of $454.83, that afterward to-wit: On or about said 21st day of April A. D. 1877, said Torbitt, for value received of this plaintiff, transferred, assigned and delivered said account so stated and approved, to this plaintiff; that no part of said account or any interest thereon has been paid and
41 this plaintiff is the owner and holder thereof, and of all legal and equitable rights appertaining to the same.

Fourth—Plaintiff on its information and belief alleges: That on or about the 21st day of April, A. D. 1877, at, to-wit: At said County of Salt Lake, an account was stated between said William A. Stephens, as trustee, as aforesaid, and one George Clark, and upon such statement a balance of $2,227.37 was found due to the said

George Clark, from the said Stephens as trustee as aforesaid. That said last named account was then and there also submitted to said defendant Gisborn, and by him as manager for said trus-
42 tee, examined and approved, as an account stated between said George Clark and said trustee, in which the sum of $2,227.37 was as a balance found due from said trustee to said Clark. That said Stephens as such trustee agreed to pay to said Clark the said balance of $2,227.37. That afterward to-wit: On or about said 21st day of April, A. D. 1877, said Clark for value received of this plaintiff, assigned, transferred, made over and delivered said account so stated and approved to this plaintiff, of which said Stephens and said Gisborn then and there had notice. That no part of said account, or any interest thereon,
43 has been paid, and this plaintiff is the owner and holder thereof, and of all legal and equitable rights appertaining to the same.

Fifth—Plaintiff on its information and belief alleges: That on or about the 24th day of April, A. D. 1877, at, to-wit: At said County of Salt Lake, an account was stated between said William A. Stephens as trutstee as aforesaid, and one Edward Stott, and upon such statement a balance of $172.19 was found due to said Edward Stott from said Stephens as trustee as aforesaid. That said last named account was then and there submitted to said defendant
44 Gisborn and by him as manager for said trustee, examined and approved as an account stated between said Stott and said trustee, in which the sum of $172.19 was, as a balance, found due from said trustee to said Stott. That said Stephens as said trustee, agreed to pay to the said Stott, the said balance of $172.-19. That afterwards, to-wit; On or about the 24th day of April, A. D. 1877, said Stott, for value received of this plaintiff, assigned, transferred, made over and delivered said account so stated and approved, to this plaintiff. That no part of said account, or of any interest thereon, has been paid, and this plaintiff is
45 the owner and holder thereof, and of all legal and equitable rights appertaining to the same.

Sixth—Plaintiff on its information and belief alleges: That on or about the 24th day of April, A. D. 1877, at, to-wit: At said County of Salt Lake, an account was stated between said William A. Stephens, as trustee as aforesaid, and one Owen Long, and upon such statement, a balance of $235, was found due to the said Owen Long, from said Stephens as trustee as aforesaid. That said last named account was then and there also submitted to said defendant Gisborn, and by him as manager for said trustee, examined and ap-

proved, as an account stated between said Long and said trustee,
in which the sum of $235 was, as a balance, found due
46 from said trustee to said Long. That said Stephens, as
such trustee, agreed to pay to said Long the said balance of $235. That afterwards, to-wit: On or about said 24th day of April, A. D. 1877, said Long for value received of this plaintiff, transferred, assigned, made over and delivered said account so stated and approved to this plaintiff, that no part of said account, or of any interest thereon, has been paid and that this plaintiff is the owner and holder thereof, and of all legal and equitable rights appertaining to the same.

Seventh—Plaintiff on its information and belief alleges:
47 That on or about the 23rd day of April, A. D. 1877, at,
to-wit: At said County of Salt Lake, an account was stated between said William A. Stephens, as trustee as aforesaid, and the firm of Thompson & Jurgensen, and upon such statement a balance of $376.69 was found due to the said Thompson & Jurgensen, from said Stephens as trustee as aforesaid; that said last named account was then and there also submitted to said defendant Gisborn, and by him, as manager for said trustee, examined and approved, as an
account stated between said Thompson & Jurgensen and
48 said trustee, in which the sum of $376.69, was, as a balance,
found due from said trustee to said Thompson & Jurgensen. That said Stephens, as such trustee, agreed to pay to said Thompson & Jurgensen the said balance of $376.69, that afterwards, to-wit: On or about the 23rd day of April, 1877, said Thompson & Jurgensen, for value received of this plaintiff, assigned, transferred, made over and delivered said account so stated and approved to this plaintiff; that no part of said account, or of any interest thereon, has been paid; that this plaintiff is the owner and holder
49 thereof, and of all legal and equitable rights appertaining
to the same.

Eighth—Plaintiff on information and belief, alleges: That on or about the 23rd day of April, A. D. 1877, at, to-wit: At said County of Salt Lake, an account was stated between said William A. Stephens, as trustee, as aforesaid, and one H. E. Barstow, and upon such statement, a balance of $510 was found, due to the said H. E. Barstow, from said Stephens as trustee, as aforesaid. That
said last named account was then and there also submit-
50 ted to said defendant Gisborn, and by him as manager for
said trustee, examined and approved as an account stated between said Barstow and said trustee, in which the sum of $510, was, as a balance, found due from said trustee to said Barstow.

That said Stephens as such trustee, agreed to pay to said Barstow the said balance of $510. That afterwards, to-wit: On or about the said 23rd day of April, A. D. 1877, the said Barstow for value received of this plaintiff assigned, transferred, made over and delivered said account, so stated and approved, to this plaintiff; that no part of said account, or, of any interest thereon, has
51 been paid, and that this plaintiff is the owner and holder thereof, and of all legal and equitable rights appertaining to the same.

Ninth—Plaintiff on its information and belief, alleges: That on or about the 23rd day of April, A. D. 1877, at, to-wit: At said County of Salt Lake, an account was stated between said William A. Stephens, as trustee, as aforesaid, and the firm of Selig & Simon, and upon such statement a balance of $1,763.58 was found due to the said Selig & Simons from said Stephens as trustee, as aforesaid. That said last named account was then and there also submitted to said defendant Gisborn, and by him as manager for said
52 trustee, examined and approved, as an account stated between said Selig & Simon, and said trustee, in which the sum of $1,763.58, was, as a balance, found due from said trustee to said Selig & Simon. That said Stephens, as such trustee, agreed to pay to said Selig & Simon the said balance of $1,763,58; that afterwards, to-wit: On or about said 23rd day of April, A. D. 1877, said Selig & Simon, for value received of this plaintiff, assigned, transferred, made over and delivered said account so stated and
53 approved, to this plaintiff, that no part of said account, or of any interest thereon, has been paid; and that this plaintiff is the owner and holder thereof, and of all legal and equitable rights appertaining to the same.

Tenth—Plaintiff on its information and belief, alleges: That on or about the 24th day of April, A D. 1877, at, to-wit: At said County of Salt Lake, an account was stated between said William A. Stephens, as trustee as aforesaid, and one S. P. Teasdel, and upon such statement, a balance of $131,12 was found due to the said S. P. Teasdel, from said Stephens as trustee, as aforesaid. That said last named account, was, then and there, also
54 submitted to said defendant, Gisborn, and by him, as manager for said trustee, examinedand approved, as an account, stated between said Teasdel and said trustee, in which the sum of $131,12 was, as a balance, found due from said trustee to said Teasdel. That said Stephens as such trustee, agreed to pay to said Teasdel, the said balance of $131.12. That afterwards, to-wit: On or about said 24th day of April, A. D. 1877, the said Teasdel,

for value received of this plaintiff, assigned, transferred, made over and delivered said account so stated and approved, to this
55 plaintiff; that no part of said account or, of any interest thereon, has been paid; that this plaintiff is the owner and holder thereof, and of all legal and equitable rights appertaining to the same.

Eleventh—Plaintiff on its information and belief alleges, that on or about the 14th day of May, A. D. 1877, at, to-wit: at said County of Salt Lake, an account was stated between said William A. Stephens, as trustee as aforesaid, and one George Clark,
56 and upon such statement a balance of $1,478.04 was found due to said George Clark from said Stephens, as trustee, as aforesaid. That said last named account was then and there also submitted to said defendant Gisborn, and by him, as manager for said trustee, examined and approved, as an account stated between said Clark and said trustee, in which the sum of $1,478.04 was, as a balance, found due from said trustee to said Clark. That said Stephens as said trustee agreed to pay to said Clark the balance of $1,478.04. That afterwards, to-wit: On or about the 14th day of May 1877, for value received of this plaintiff, said Clark, assigned, transferred, made over and delivered said account
57 so stated and approved to this plaintiff; of which said Stephens and said Gisborn was then and there duly notified. That no part of said account, or of any interest thereon, has been paid; that this plaintiff is the owner and holder thereof, and of all legal and equitable rights appertaining to the same.

Twelfth—Plaintiff upon its information and belief alleges: That on or about the 3rd day of July A. D. 1778, at, to-wit:
58 at said County of Salt Lake, an account was stated between said William A. Stephens, as trustee as aforesaid, and one George Clark, and upon such statement a balance of $1,952.44 was found due to said George Clark, from said Stephens as trustee, as aforesaid. That said last named account was, then and there, also submitted to said defendant Gisborn, and by him as manager for said trustee, examined and approved as an account stated between said Clark and said trustee, in which the sum of $1,952.44, was, as a balance, found due from the said trustee to said Clark. That said Stephens, as such trustee, agreed to pay
59 said Clark the said balance of $1,952.44. That afterwards, to-wit: On or about the 3rd day of July, A. D. 1877, said Clark for value received of said plaintiff, assigned, transferred, made over and delivered said account so stated and approved, to said plaintiff, of all which said Stephens and said Gis-

born t en and there had due notice ; that no part of said account, or of any interest thereon, has been paid ; that this plaintiff is the owner and holder thereof, and of all legal and equitable
60 rights appertaining to the same.

Thirteenth—Plaintiff on its information and belief alleges: That on or about August 16th, A. D. 1877, at, to-wit: At said County of Salt Lake, an account was stated between said William A. Stephens as trustee, as aforesaid, and one George Clark, and upon such statement a balance of $5,139.88, was found due to the said George Clark from said Stephens as trustee as aforesaid. That said last named account was then and there also submitted to said defendant Gisborn, and by him, as manager for said trustee, examined and approved, as an account stated, between said Clark and said trustee, in which the sum of $5,139.88, was, as a balance, found due from said trustee to said Clark. That said Stephens as such trustee
61 agreed to pay said Clark, the said balance of $5,139.88.

That afterward, to-wit: On or about said 16th day of August A. D. 1877, said Clark, for value received of this plaintiff, transferred, assigned, made over and delivered, said account, so stated and approved, to this plaintiff, all of which said Stephens and said Gisborn then and there had due notice ; that no part of said account, or of any interest thereon, has been paid ; that this plaintiff is the owner and holder thereof, and of all legal and equitable rights appertaining to the same.

62 Fourteenth—Plaintiff on its information and belief alleges : That on or about November 19th A. D. 1877, at, to-wit: At said County of Salt Lake, an account was stated between said William A. Stephens, as trustee as aforesaid, with one George Clark, and upon such statement a balance of $8,500.90 was found due to the said George Clark from said Stephens, as trustee, as aforesaid. That said last named account, was then and there also submitted to said defendant Gisborn and by him, as manager for said trustee, examined and approved, as an account stated between said Clark and said trustee in which the sum of $8,500.90,
63 was, as a balance, found due from said trustee to said Clark. That said Stephens, as such trustee, agreed to pay to said Clark said balance of $7,500.90.

That afterward, to-wit : On or about the 19th day of November A. D. 1877, said Clark, for value received of this plaintiff, transferred, assigned, made over and delivered said account so stated and approved to this plaintiff, of all which said Stephens and said Gisborn, then and there had due notice. That of the said several accounts, so as aforesaid stated between said Stephens as trustee,

as aforesaid, and said George Clark, none of them contained, or was in anywise made up of, any antecedent account stated between the parties.

Upon its information and belief plaintiff further alleges: That on or about the 12th day of February A. D. 1875, said William A.
64 Stephens, as trustee, as aforesaid, was authorized and empowered by said Allen, Stephens & Co., as their trustee, and in furtherance of the trust aforesaid, to endorse, as such trustee, and assign and deliver, said four promissory notes herein before set out to said plaintiff; and that on or about the day and year last aforesaid under such authority and power, and for value received by said Allen Stephens & Co., said Stephens, as such trustee, and by the name, style and description of "Wm. A. Stephens, trustee," endorsed in writing and assigned and delivered
65 each of said promissory notes to this plaintiff; and that on the day and year last aforesaid, said Allen, Stephens & Co., for value received of plaintiff in writing, by them executed and delivered, to plaintiff, granted, bargained, sold assigned, transferred and set over to the plaintiff, all claims and demands which the said Allen, Stephens & Co., had against the said Matthew T. Gisborn and Warren Hussey, jointly or individually, for moneys theretofore loaned or advanced for their joint or individual account to said William A. Stephens, trustee, together with all promissory notes made by said Matthew T. Gisborn and Warren Hussey to said William A. Stephens, trustee, to secure portions of the said indebtedness. That the said transfer and assign-
66 ment by the said Allen, Stephens & Co., was designed and intended to cover and include, and did cover and include, the said $400,000.00 mentioned in, and secured to be paid in and under the terms of said declaration of trust; that $100,000.00 thereof was evidenced by said promissory notes, and is mentioned in said declaration of trust as bearing interest at the rate of seven per cent. per annum, from and after April 30th 1874; and $300,000.00 thereof is mentioned in said declaration of trust and by the terms thereof, bears interest at the rate of seven per cent. per annum, from and
67 after the 30th day of May, A. D. 1874. That no part of said $400,000.00, or of the interest thereon, has been paid, and that plaintiff is now the owner and holder of said promissory notes, and of all claims and demands which, prior to the transfer thereof to plaintiff by said Allen, Stephens & Co., or said Stephens, trustee, as aforesaid, were held or owned by said Allen, Stephens & Co., jointly or individually, or by said Stephens, as trustee, for all moneys used by said Stephens, trustee, and advanced by him,

as trustee, to said Gisborn as set forth in said declaration of trust; together with all the rights and equities, and security for the payment of said $400,000.00 given and secured under and by
68 virtue of said declaration of trust.

Plaintiff upon its information and belief further alleges: That on or about the beginning of the year 1878, the various sums of money herein before mentioned and designated by numbers, running from one to fourteen inclusive, had been expended by said trustee on said mine, to protect the same, make it profitable, and execute said trust aforesaid, and that at said last named date said trustee had no trust fund with which to continue work on said premises, nor could he raise any money from any of the parties benficially interested, or upon the premises, encumbered, as said premises then were, by the liens for the expenditures aforesaid, necessarily incurred in the execution of said trust, as well as by
69 the liens set out and declared in said declaration of trust; and that thereupon said trustee was compelled to cease work and explorations on said premises.

That thereupon, the said trustee, in the execution of his trust, had no election, but to close out said trust by proper legal proceedings, subjecting the trust estate to sale, or to lease said premises in such a way that the mines should be explored and developed, and the displaced vein and ore sought for, without expense to trust estate, and upon an agreement to share the profits with the lessees for a time, if such vein and ore was found, or the premises again became profitable. That by the advice and with the consent
70 of all the beneficiaries in said trust, and with the agreement between all such parties in interest, that the delay caused by such lease or leases in the execution and winding up of the trust, should in no way prejudice any of said parties such a lease as is herein before designated, was made in 1878, and renewed in 1879, and the lessees therein diligently worked and explored said premises, and faithfully endeavored to find said displaced vein and ore, and render said premises profitable in working; but that said lessees failed to find such vein and ore, and lost, in their
71 work under said leases about $4,000.

That since the expiration of said leases said premises have not been worked by said trustee, and the same is deteriorating in value, by reason of the caving in and destruction of a portion of the workings on the mine. That said trustee has not further executed said trust, has not as such trustee, paid any of said sums, so as aforesaid secured to be paid in, or under the said trust, or in or under the said proceedings of said trustee in his said attempts to

execute said trust, and has in no wise foreclosed or settled up said trust.

That at the date of the said creation of said trust, said defendants Allen, Stephens & Co., were co-partners, doing business
72 under that firm name, and such co-partnership was composed of the following named persons, to-wit: B. F. Allen, William A. Stephens and Herman Blennerhassett; that since that date said B. F. Allen, who now resides at Des Moines, Iowa, became and was duly adjudged a bankrupt, and said defendant Hoyt Sherman, now residing in said Des Moines, Iowa, was by a court of competent jurisdiction duly adjudged to be, and duly appointed, assignee in bankruptcy of said Allen bankrupt as aforesaid, and duly qualified as such. That said defendant Herman Blennerhassett now resides at Evanston, Cook County, Illinois, and said Warren Hussey now resides at Denver, Colorado. That said defendants, Allen, Stephens & Co., William A. Stephens, Herman
73 Blennerhassett, B. F. Allen, Hoyt Sherman as assignee as as aforesaid, and Warren Hussey, or some or each of them have, or claim an interest or interests in, or lien or liens upon the said real property; but that the same, whatever they, or either of them may be, are subject to the trust and liens, and proceedings and expenditure thereunder, herein before set out.

That the said beneficiaries and parties in interest in said trust are remediless, unless this court shall cause an account to
74 be taken of any and all liens created by or under said trust, against or upon said premises, in whose favor and for what amounts, and the priorities therein, and shall further cause said premises to be sold and the proceeds to be applied upon said liens, according to their priorities.

Plaintiff further alleges that said William A. Stephens, during all said time from said 30th day of April, 1874, up to this date, was and now is, a resident of the State of New York, and that
75 from said 30th day of April 1874, or any subsequent date, until the bringing of this suit, said Stephens has not at any one time, or any number of times added together, been in said territory of Utah four years.

Wherefore plaintiff demands judgment against said defendants.

First—That an account be taken of the execution of said trust, and of the dealings and transactions from the commencement thereof, and of the moneys received and paid out by said Stephens as such trustee, in, under and in pursuance of said trust.

Second—That said liens upon said premises, and the

priorities thereof, be declared and established, according to the respective rights of the parties hereto.

Third—That the usual decree be made for the sale of said premises by the United States Marshal in and for the Territory of Utah, according to law, and the practice of this court; that the proceeds of such sale may be applied in payment of the respective liens found by the court to exist, to the respective parties having such liens, according to the priorities thereof as fixed by the court; that said defendants, and all persons claiming under them or either of them subsequent to the execution of said declaration of trust upon said premises, either as purchasers, incumbrancers or otherwise, may be barred and forever foreclosed of all right, claim or equity of redemption in said premises and every part thereof; that plaintiff or any other party to this suit may become a purchaser at such sale; that said Marshal execute a deed to the purchaser; that said purchaser be let into the possession of the said premises, upon the production of said Marshal's deed therefor; that the plaintiff may have such other or further relief in the premises as to this court may seem meet and equitable; and

Fourth—For costs of suit.

MARSHALL & ROYLE,

Attorneys for Plaintiff.

TERRITORY OF UTAH, }
COUNTY OF SALT LAKE. } ss.

Thomas Marshall having been first duly sworn, upon his oath says: I am one of the attorneys for the plaintiff in this action: I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information and belief, and to those matters I believe it to be true.

The reason why the complaint in this case is not verified by plaintiff, or an officer of plaintiff, is, that plaintiff is a corporation, and its place of business at Hartford, in the State of Connecticut, and that none of its officers are now in the said County of Salt Lake, which is the county where I reside. That my knowledge, information and belief, are founded upon the written evidence now in my possetion, upon actual knowledge of most of the matters alleged, and upon information derived, both from plaintiff and defendants.

THOMAS MARSHALL.

Subscribed and sworn to before me, by Thomas Marshall, this 22nd day of June, 1883.

[SEAL.] WM. C. HALL,
Notary Public.

"EXHIBIT A."

81 This indenture, made the 24th day of February, in the year of our Lord, One Thousand Eight Hundred and Seventy-four, between Obadiah Embody, Warren D. Heaton and William E. Miller, of the City of Oakland, County of Alameda and State of California, parties of the first part, and Matthew T. Gisborn of the City of Salt Lake, Territory of Utah, the party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of $400,000, lawful money [currency] of the United States of America, to them in hand, paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, conveyed
82 and confirmed, and by these presents do grant, bargain and sell, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, all the certain lot piece or parcel of land, situate, lying and being in the County of Tooele, Territory of Utah, and bounded and particularly described as follows, to-wit: [2-3] two-thirds of that certain property known as the "Mono Mine," containing [1,600] sixteen hundred linear feet, located in Dry Canyon, Ophir Mining District, Tooele County, Territory of Utah, its dips, spurs and angles, together with all the tools, machinery, implements, houses
83 and stock used in working said mine; all water rights, wood lands, tunnel site and appurtenances belonging.

Together with all and singular the tenements, hereditiments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, reminder and reminders, rents, issues and profits, and also all the estate, right title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the said premises, and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second
84 part, his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of H. M. MORGAN, H. M. EDDY.

OBADIAH EMBODY, [SEAL.]
WARREN D. HEATON, [SEAL.]
WILLIAM E. MILLER. [SEAL.]

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO. } ss.

On the 24th day of February, One Thousand Eight Hundred and Seventy-four, before me, Henry M. Morgan, a com-
85 missioner of deeds for Utah Territory in the State of California, and residing at San Francisco, personally appeared, Obadiah Embody, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the person described in and who executed the annexed instrument, and who acknowledged to me that he executed the same, freely and voluntarily, and for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and date in this certificate last above written.

[SEAL.] H. M. MORGAN,
Commissioner for Utah in California.

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO. } ss.

On this 25th day of February, One Thousand Eight
86 Hundred and Seventy-four, before me, Henry M. Morgan, a commissioner of deeds for Utah Territory, in the State of California, and residing at San Francisco, personally appeared Warren D. Heaton and William E. Miller, whose names are subscribed to the annexed instrument, as parties thereto, personally known to me to be the persons described in, and who executed the annexed instrument, and who acknowledged to me that they executed the same, freely and voluntarily and for the uses and purposes therein mentioned.

87 Witness my hand and official seal, the day and date in this certificate last above written.

[SEAL.] H. M. MORGAN,
Commissioner for Utah, in California.

Recorded, June 12th, 1874.

TERRITORY OF UTAH,
COUNTY OF TOOELE. } ss.

I, F. M. Lyman, Recorder of Tooele County, U. T., certify the within is a full, true and correct copy of the deed, Embody, Heaton and Miller, to M. T. Gisborn, as fully appears on pages 81 and 82 of book "R" of Tooele County Records.

Witness my hand and seal, this 11th day of June, A. D. 1883, at my office, in the City and County of Tocele, U. T.

[SEAL.] (Signed,) F. M. LYMAN,
County Recorder,
by H. S. G.,
Deputy.

"EXHIBIT B."

This indenture, made the 30th day of April, in the
88 year of our Lord, One Thousand Eight Hundred and Seventy-four, between Matthew T. Gisborn, of the City of Salt Lake, Territory of Utah, party of the first part, and William A. Stephens, trustee, of the City of New York, party of the second part, witnesseth.

That the said party of the first part, for and in consideration of the sum of one hundred thousand [100,000] dollars, lawful money of the United States, to him in hand paid, by the said party of the second part, at or before the ensealing or delivery of these presents, the receipt whereof, is hereby acknowledged, and the said
89 party of the second [first] part, his heirs, executors and administrators, forever released and discharged from the same by these presents, has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, remise, release and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain mining property known and designated as follows, viz.: An undivided ten-eighteenths [10-18] of the *Mono Silver Mine*, located in Dry Canyon, Ophir Mining District, Tooele County, Utah Territory, the said mine being, lying and situate on the west side of the said Dry Canyon, and containing sixteen hundred [1,600]
90 feet, with all the buildings, improvements, appurtenances situated thereon and thereunto belonging; with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or

therewith usually had and enjoyed; together with all and singular the tenemants, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, to the said party
91 of the first part, of, in and to the same, and every part and parcel thereof with the appurtenances.

To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use and benefit and behoof, forever.

And the said Matthew T. Gisborn, for himself, and his heirs, executors, and administrators, does covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that the said Matthew T. Gisborn, at the time of and sealing
92 and delivery of these presents, was lawfully seized in and of good absolute and indeafeasible estate of inheritance in fee simple of, and in all and singular the above granted and described premises, with the appurtenances, buildings, improvements, etc., thereunto belonging, and has good right, full power, and lawful authority, to grant, bargain, sell and convey the same in manner aforesaid.

And that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peacable and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof with the appurte-
93 nances, without any let, suit, trouble, molestation, eviction or disturbance, of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same.

And that the same are now free, clear discharged and unincumbered, of and from all former and other grants, titles, charges, estats, judgments, taxes, assessments and incumberances of what nature and kind soever.

And also that the said party of the first part, and his heirs, and all and every person or persons, whomsoever lawfully or equitably derive any estate, right, title or interest, of, in or to the
94 hereinbefore granted premises, by, from, under or in trust for him or them shall and will at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do and execute, or cause to be made, done and ex-

ecuted, all and every such further and other lawful and reasonable acts, conveyance, and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted or so intended to be, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel, learned in the
95 law shall be reasonably advised or required.

An the said Matthew T. Gisborn, for himself and his heirs, the above described, granted and hereby released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part, his heirs and against all an every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents, forever defend.

In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

[SEAL.] MATTHEW T. GISBORN,

Signed, sealed and delivered in the presence of
R. S. LAW.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } ss.

On the 30th day of April, in the year One Thousand
96 Eight Hundred and Seventy-four, before me, personally came Matthew T. Gisborn, known to me to be the individual described in, and who executed the foregoing instrument, and personally acknowledged that he executed the same.

[SEAL.] S. B. GOODALL,
Notary Public,
[174] New York County.

Filed, May 12th, 1874. Recorded, May 23rd, 1874.
R. WARBURTON,
Recorder.

TERRITORY OF UTAH, }
COUNTY OF TOOELE. } ss.

I, F. M. Lyman, Recorder of Tooele County, U. T.,
97 certify the above and foregoing is a full, true and correct copy of the deed of Matthew T. Gisborn to William A. Stephens, as fully appears upon pages 33, 34 and 35 of book "R" of Tooele County Records.

Witness my hand and seal the 6th day of June, A. D. 1883, at my office in the City and County of Tooele, U. T.

[SEAL.] F. M. LYMAN,
County Recorder.
By H. S. G.,
Deputy.

"EXHIBIT C"

This indenture made the 6th day of May, in the year
98 one thousand eight hundred and seventy-four, between Matthew T. Gisborn, of Salt Lake City, Territory of Utah, party of the first part, and William A. Stephens, trustee, of the City, County and State of New York, party of the second part, witnesseth.

That the said party of the first part, for and in consideration of $266,666.66-100, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors and administrators, forever released and discharged from the same, by these presents has granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents does grant bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and to his heirs and assigns forever; all that certain mining property known and designated as follows, viz.: an undivided eight eighteenths [8-18] of the *Mono Silver Mine*, said mine, being, lying and situate in Dry Canon, Ophir Mining District, Tooele County, Utah Territory, together with all the buildings, fixtures and improvements there-
99 unto appertaining and belonging, and also all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein and all the rights, priveleges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remain-
100 ders, rents, issues and profits thereof, and all the estate, right title, interest, property, possession, claim and demand, whatsoever, as well in law as in equity of the said party of the first part of, in and to the same, and every part and parcel thereof, with the appurtenances.

To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to him and their own
101 proper use, benefit and behoof forever.

And the said Matthew T. Gisborn, for himself and his heirs, executors and administrators, does covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that the said Matthew T. Gisborn, at the time of the sealing and delivery of these presents, was lawfully seized in of a good, absolute and indefeasible estate of inheritance, in fee simple, of, and in all and singular the above granted and described premises, with the appurtenances, privileges and fixtures thereunto belonging, and has good right, full power and lawful authority, to grant, bar-
102 gain, sell and convey the same in manner aforesaid.

And that the said party of the second part, his heirs and assigns shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same.

And that the same now are free, clear, discharged and unincumbered of and from all former and other grants, titles,
103 charges, estates, judgments taxes, assessments and incumbrances, of what nature or kind soever.

And also that the said party of the first part and his heirs and all and every person or persons whomsoever lawfully or equitably deriving and estate, right, title, or interest of, in or to the herein before granted premises, by, from under or in trust for him, and them, shall and will at any time or times hereafter upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby granted, or so intended to be, in and to the said party of the second part, his heirs and as-
104 signs, forever, as by the said party of the second part, his heirs or assigns, or his and their counsel, learned in the law, shall be reasonably advised or required.

And the said Matthew T. Gisborn heirs, the above described and hereby granted and released premises and every part

and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part, and his heirs, and against all and every person
105 and persons whomsoever, lawfully claiming or to claim the the same, shall and will warrant, and by these presents forever defend.

In witness whereof, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

[SEAL.] MATTHEW T. GISBORN.

Signed, sealed and delivered in the presence of

R. S. LAW.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } ss.

On the 6th day of May, in the year One Thousand Eight Hundred and Seventy-four, before me, personally came Matthew T. Gisborn, known to me to be the individual described in, and who executed the foregoing instrument, and personally acknowledged that he executed the same.

[SEAL.] S. B. GOODALL,
Notary Public, [174]
New York County.

Recorded, May 12th, 1874.

TERRITORY OF UTAH, }
COUNTY OF TOOELE. } ss.

I, F. M. Lyman, Recorder of Tooele County, U. T.,
106 certify the above and foregoing is a full, true and correct copy of the deed of Matthew T. Gisborn to William A. Stephens, as fully appears on pages 83 and 84 of book "R" of Tooele County Records.

Witness my hand and seal, this 6th day of June, A. D. 1883, at my office, in the City and County of Tooele, U. T.

[SEAL.] F. M. LYMAN,
County Recorder,
By H. S. G.,
Deputy.

"EXHIBIT D."

107 Know all men by these presents, that whereas, Matthew T. Gisborn, of the City of Salt Lake and Territory of Utah, has by two certain deeds of conveyance, bearing date

respectively, April 30th, 1874, and May 6th, 1874, conveyed to me William A. Stephens, of the City and County of New York, trustee, all of the "Mono" Mining Claim and lode, with the tenements, hereditaments and appurtenances thereunto appertaining, situate in Dry Canyon, Ophir Mining District, Tooele County and Territory aforesaid, and more particularly described in the survey and application for a patent therefor, now pending in the United States Land Office.

108 Now, as a part of the same transaction, I, the said William A. Stephens, trustee as aforesaid, do declare that such conveyance was made and received upon the trusts, nevertheless, and to and for the uses, interests, securities and purposes hereinafter limited, specified, described and declared, that is to say, upon trust to receive the issues, rents and profits of the said premises, and to apply the same as received as follows, viz.:

First—To the payment of all expenses of operating said mine, keeping the same with the appurtenances in good condition and repair, transportation of ores, etc., from and after the 30th day of April, 1874, including expenses for the hoisting works on said premises, and current public taxes.

109 Second—To the payment to me as trustee of the sum of four hundred thousand dollars [$400,000] advanced by me as trustee to said Gisborn, for the purchase of two-thirds, undivided of said premises from his late co-tenants, together with interest at the rate of seven [7] per cent. per annum. as follows: On $100,000 thereof, from and after the said 30th day of April, 1874, and on the remaining $300,000 from and after the 30th day of May, 1874.

Third—To the payment to said Matthew T. Gisborn, of a sum equal to seven per cent. per annum, upon one-third of the net proceeds of said mine, so applied to the payment of said sum of $400,000, and interest as aforesaid, from and after the same
110 shall be so applied, or a like percentage per annum on such portion of one-third of the net proceeds of said property, as said Gisborn shall not have received in the meantime with my consent.

Fourth—And finally to deliver and pay over to said Gisborn, his heirs or assigns, the sum of two hundred and seventy-five thousand [275,000] dollars, less the amount of net proceedings he may have received as last aforesaid, but exclusive of the interest mentioned last above in sub-division third.

And I, the said William A. Stephens, trustee, as aforesaid, do

covenant and agree to, and with the said Matthew T. Gisborn, his heirs and assigns, that I shall and will duly apply all the
111 rents, issues and profits of said property to the uses aforesaid, in the order aforesaid, and as soon as the same shall be received by me, and further, that as soon as said uses shall be fulfilled and discharged, I will cause said conveyance of said premises to me to be cancelled of record, by doing such acts, and executing such instrument as may be necessary to recover or revert the title of said premises, with the tenements, hereditaments and appurtenances thereto appertaining to and in the said Matthew T. Gisborn, his heirs and assigns, to the same extent and estate, as now held by me, as aforesaid as trustee.

And it is further declared as one of the terms of said trust, that during the continuance thereof the said premises and prop-
112 erty, and all the operations and business pertaining thereto, shall be placed in the management and control of two persons, one of whom to be selected by the said Matthew T. Gisborn, and the other by myself, and in case of any disagreement between them, in respect to the operation of said mine, as the management of the business pertaining thereto, the two agents so selected, shall each select one person, and the matter of difference shall be submitted for decision to the persons so selected as last aforesaid, and in the event that the two alternates so selected, as last aforesaid, cannot agree upon a decision of the matter so referred to
113 them, they shall select a third party as an umpire, whose decision shall determine the matter in dispute; the compensation of such agents, and their respective alternates, shall be paid by the party on whose behalf they are selected respectively, and that of the umpire, if incurred, shall be paid as a current expense of said mine, and it is understood and approved, that said Matthew T. Gisborn, both select and appoint Alexander W. Adams as such managing agent, on his behalf, and that I select and appoint Samuel K. Holman as such managing agent on my behalf, and that any vacancy which may occur in either appointment, shall be filled by the same right of selection on
114 either side, but in no case shall any person, directly or indirectly as contingently interested in said property, be selected for this purpose, but nevertheless, it is provided and specified, as a further term of said trust, that in the meantime, on request of said Matthew T. Gisborn, his assigns or legal representatives I shall and will reconvey to such person or persons as he may designate that portion of said mining claim and premises which is situate east of the center of the ravine crossing said prem-

ises, nearest the eastern boundary thereof, which said ravine is further designated and identified as one in which a living spring rises, a short distance above the north boundary of said
115 premises, the more exact metes, bounds and extent of such portion to be hereafter described by exact measurement, according to said tokens.

In testimony whereof, I hereunto set my hand and affix my seal this 30th day of May 1874.

[SEAL] W. A. STEPHENS,
Trustee.

J. B. ROSBOROUGH.
JOHN T. CAINE.

UNITED STATES OF AMERICA.

TERRITORY OF UTAH. } ss.
COUNTY OF SALT LAKE. }

On this 13th day of May A. D. one thousand eight hundred and seventy-four, before me John T. Caine, a notary public within and for Salt Lake County, in the Territory of Utah, duly elected, commissioned and qualified, personally appeared William A. Stephens, trustee, whose name is subscribed to the annexed instrument, as a party thereto personally known to me to be the same per-
116 son described in, and who executed the said annexed instrument as a party thereto, and duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office in Salt Lake City, U. T., the day and year in this certificate first above written.

[SEAL] JOHN T. CAINE,
Notary Public for Salt Lake County,
Utah Territory.

117 Recorded June 12th, 1874.

TERRITORY OF UTAH, } ss.
COUNTY OF TOOELE. }

I, F. H. Lyman, recorder of Tooele County, Utah Territory, certify the above and foregoing is a full, true and correct copy of a declaration of trust by W. A. Stephens, as fully appears on pages 85, 86 and 87 of book "R," Tooele County records.

Witness my hand and seal this 6th day of June A. D. 1883, at my office in the City and County of Tooele, Utah Territory.

[SEAL.] F. M. LYMAN,
County Recorder.
By H. S. G.
Deputy.

[ENDORSED.] Title of Court and Cause. Complaint. Filed August 20th, 1883.

O. J. AVERILL, Clerk.
By H. G. McMILLAN, Deputy Clerk.

MARSHALL & ROYLE,
Attorneys for Plaintiffs.

[TITLE OF COURT AND CAUSE.]

DEMURRER.

Now comes Matthew T Gisborn, of the above named defendants, appearing for himself only, and demurs to the complaint filed in this action for the reason, that the said complaint does not state facts sufficient to constitute a cause of action. Therefore he asks that the same be dismissed and that he recover his costs
118 expended herein as to him.

ARTHUR BROWN,
Attorney for M. T. Gisborn.

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

Arthur Brown being duly sworn says, I am the Attorney for Matthew T. Gisborn in this action; that this demurrer is not interposed for delay merely.

ARTHUR BROWN.

Filed September 10, 1883.

Third Judicial District Court, Utah.

MONDAY, September 29th, 1883.

[TITLE OF CAUSE.]

The demurrer of defendant M. T. Gisborn having
119 been argued and submitted and the court having fully considered the questions thereby raised and being now of

the opinion that the same ought to be disallowed. It is ordered and adjudged that said demurrer be and the same is hereby overruled, to which ruling and order said defendant Gisborn, by his attorney duly accepted, and said defendant asking therefor is allowed thirty days time to answer the complaint herein.

[TITLE OF COURT AND CAUSE.]

ANSWER.

Now comes the said defendant Matthew T. Gisborn, and answers the complaint filed herein, and admits that on the 30th day of April 1874, this defendant was the owner of the Mono Silver Mine, subject only to the paramount title of the United States; that application for patent therefor was then pending, which has since been issued.

This defendant further answering denies that the deed set forth in the complaint to William A. Stephens, trustee, of date of April 30th, 1874, did convey to the said trustee an undivided interest of ten eighteenths of, in and to the said Mono Silver Mine, or that he ever conveyed to said Stephens any title or interest whatsoever in said Mono Silver Mine. Defendant denies that the deed set forth in the complaint as bearing date the 6th day of May 1874, from
121 this defendant to the said William A. Stephens, trustee, did convey to the said Stephens an undived eight eighteenths interest of, in and to the said Mono Silver Mine, or any other interest or title thereto whatsoever.

Defendant further answering says that he has no knowledge, information or belief sufficient to enable him to answer whether the defendants named in the complaint as composing the firm of Allen, Stephens & Co., did actually compose such firm, or whether they were such partners; that he had no knowledge, information or belief sufficient to enable him to answer and therefore denies
122 that there was any such firm as Allen, Stephens & Co., and denies, in that manner, that the defendant, Stephens was a member thereof, and denies that any or either of the defendants named as members of said firm, composed or were members thereof in the year 1874, or at any other time, and in like manner denies that William A. Stephens was their agent, and further answering denies, on information and belief, that William A. Stephens was the trustee of said co-partnership, if any such co-partnership existed, or that he was the trustee of any one else,

or any other person in connection with this transaction, than this defendant.

123 Further answering this defendant denies that the firm of Allen, Stephens & Co., ever loaned or advanced, either in the month of April or May in the year 1874, or at any other time, to this defendant, the sum of $400,000, or any other sum whatsoever, either for the purposes set forth in the said declaration of trust, or for any other purpose whatsoever.

This defendant further answering denies that the said firm of Allen, Stephens & Co, advanced to him the said sum of $100,000, or any other sum, on or about the 30th day of April, 1874, or at any other time, and denies that the said firm advanced or paid to this defendant, the remaining residue of $300,000, or any 124 part thereof, on or about the 30th day of May, 1874, or at any other time.

This defendant further answering denies, that for any amount of money advanced by Allen, Stephens & Co., he executed the said four promisory notes set forth in the complaint, and this defendant denies that the said four promisory notes, or any of them, evidenced any money advanced by the said firm of Allen, Stephens & Co.

Defendant further answering denies that the remaining $300,000 spoken of in the complaint and in the declaration of trust, was payable on demand, or that it was ever payable or intend- 125 ed to be payable by this defendant, and denies that there was any contract or agreement whatsoever, by which this defendant was ever, under any circumstances, to be liable for the said $300,000, or by which his property was to be liable for the said sum, any other or further than as provided by the said declaration of trust, and this defendant denies that the said claim bore any rate of interest except as stated in the said declaration of trust; denies that the said defendant owes any interest, or is indebted for any interest whatsoever on said note.

Defendant further answering denies that the said deeds attached to the complaint as Exhibits "B" and C," and said dec- 126 laration of trust, Exhibit "D," were made and executed to secure the payment according to the priorities, and in the order set forth in the said declaration of trust, of the indebtedness therein named, or which should be incurred in the execution of the terms of such trust. Denies that the said deeds and declaration of trust were made to secure any money or any indebtedness or the payment of any money, and denies that they were made for any other purpose whatsoever, except such as appears upon the face of the said declaration of trust.

Defendant further answering denies that the said declaration of trust provides for the payment of the said indebtedness in any other words or terms than the exact words of the declaration
127 itself

This defendant further answering denies that the realty itself in addition to the rents, issues and profits thereof, were to be, or were, under and by said trust deed, security for the payment of the several amounts mentioned in said declaration of trust, or of any of said amounts, or for any sum whatsoever, or that the realty itself was mortgaged or pledged or deeded, or in any other manner placed within the power of said trustee for security for any sum whatsoever, but it was expressly understood between said parties, as stated in said declaration of trust, that only the rents, issues and and profits of the said mine were to be used for the payment of said several sums of money, and for the purposes named in the
128 said declaration of trust, the realty was expressly excluded by the understanding between the parties.

This defendant further denies that the realty was to be by the said declaration of trust or otherwise, security, or was security, for all or any of the expenses incurred in executing such trust, or all or any of the expenses of working said mine, or that either the expenses of working the said mine, or any part thereof, or the expenses of executing the said trust, or any part thereof, or the money advanced by the terms thereof, or any part thereof, was a charge upon or against the property itself, or that it was a charge against anything except the rents, issues and profits, as stated in the said declaration of trust.

Defendant further answering denies that the said
129 Stephens, trustee, entered upon and took possession of the said premises, but admits that he appointed an agent, who, in connection with the agent of this defendant, occupied the said mine in pursuance of the said trust. This defendant further answering denies, that he, immediately after the execution of the said declaration of trust, or at any other time after the execution of the said declaration of trust, in connection with the said Stephens commenced work upon the said mine, or the extraction of ore therefrom, or sale thereof, or explored the said mine for ore, or that the work commenced in that manner continued for several years, or any other time, or until the year 1878 or any other time, but, on the
130 contrary, this defendant, at the date of the execution of said trust, was excluded from any part or participation or management or control in and to said mine, and neither worked nor directed any work in it, either in connection with the said

Stephens or otherwise, except that at a certain time, to-wit: On or about the 1st day of February, 1876, as defendant now recollects, he was employed to manage the mine, and did for a period of time after that act as manager under the direction of other parties, but that between the date of the said date of the declaration of trust, and the time of his said employment in February, 1876,

131 he had no charge, authority or direction of the said mine, or any part thereof.

This defendant denies that the work done in said mine, or the expenses incurred in working the same, during the entire period after the date of the said declaration of trust, were done or incurred upon the consultation or advice of this defendant, or that any of the work done or expenses incurred, were done or incurred upon consultation with this defendant, or with his advice, agreement or consent or approbation, except such work and expenses as were incurred during the period that this defendant himself was managing the said mine as above set forth, and that no part of the work done, or expenses incurred, between the date of the said declaration

132 of trust and the said February 1st, 1876, were approved or advised or consented to by this defendant, in any other manner or form than as agreed to beforehand by said declaration of trust.

Defendant further denies that any of the work done upon the said mine, or any expenses incurred in working the same, during any of the period of time from the date of said declaration of trust until to-day, were a charge upon the said trust estate, in default of any profits or otherwise.

Defendant further answering denies that during any part of the year 1875 and 1876, or any other time, or for any period of time whatsoever, work on said mine was suspended, either partially or at all, by reason of litigation affecting the title to any part

133 of said premises, or by reason of any litigation whatsoever.

Denies that there ever was any litigation incurred which suspended work on said mine, or any part of the same, at all; that there never was any injunction upon the said mine, or any attempt to interfere with the working of the same by any outside parties.

Defendant further answering denies that he has ever consented or advised, that any expenses of work or exploration upon said premises, be made a charge upon the said trust estate, or that any work or expenses were a charge against the said trust estate, or that any work or explorations were continued as a charge against the said trust estate upon said premises, either in the effort to find the said vein of ore displaced or otherwise, and denies that large or

any expenses were incurred, or work done or moneys expended in the protection of said property, or that anything was ever expended or incurred for the protection of said property, and denies
134 that the indebtedness set forth in the complaint, to divers persons, was properly incurred, for the purpose of protecting the said property, or for finding the said vein of ore so displaced, or that they or any of them were or are a charge against or upon the said trust estate, or that they or any of them were incurred in the proper or due execution of said trust.

As to each of the said fourteen statements of indebtedness to divers persons, set forth in the complaint, this defendant answers as follows:

First—As to the indebtedness set forth in favor of
135 Britton, Grey and Drummond, defendant has no knowledge, information or belief sufficient to enable him to answer, and, therefore, denies, that the said parties composing the said firm of Britton, Grey & Drummond, did, on the 9th day of May 1876, or at any other time, recover judgment in the Third Judicial District Court of the Territory of Utah, or any other court, against the said William A. Stephens, trustee, in the sum of $2,630.00 or any other sum whatsoever. Denies that the said parties composing the said firm, recovered any judgment whatsoever against the said William A. Stephens, trustee, and denies
136 that the amount of said judgment, or any part thereof, was a charge against the said Mono Silver Mine, or the rents, issues, or profits thereof, or was incurred by the said William A. Stephens, trustee, or that the said indebtedness was incurred by the said William A Stephens, trustee, in fulfilling or executing the said declaration of trust, and defendant, in like manner denies that the said Britton, Grey & Drummond, did on the 18th day of May 1876, or any other time, assign, transfer or set over, the said or any judgment to one John W. Simpson, either for value received or otherwise, and in like manner denies that on the 26th day
137 of September, 1877, or at any other time, the said John W. Simpson, either for value received or otherwise, assigned, transferred or set over the said judgment to the plaintiff, in this action, or any right, title or interest therein, or that any such assignment was in writing or otherwise, or existed at all; and in like manner defendant denies that no part of said judgment has been paid, and that the plaintiff is the owner or holder of said judgment, or any or all legal or equitable right, title or interest therein.

Defendant further answering, as to said first item alleges: That the said item of expense is barred by the statute of limita-

138 tions and the defendant pleads the same thereto. That the said judgment set forth in the complaint in favor of Britton, Grey & Drummond, was rendered more than five years before the commencement of this action, and that the said judgment is barred by the statute of limitations of the Territory of Utah, limiting the right of action thereon to a period of five years, which said statute this defendant pleads in bar of said first item set forth in the complaint.

Second—As to the second item of indebtedness as set forth in the complaint, this defendant answers :

Denies that he ever was indebted to John W. Kerr in
139 the sum of $4,313.95, or any other sum whatsoever, either jointly with the said Stephens, as trustee, or otherwise, either as co-partners doing business under the firm name and style of the Mono Mining Company or otherwise, and denies that he ever was a co-partner with the said Stephens, trustee, in the business of mining or anything else, and upon information and belief denies that any judgment was ever rendered in favor of John W. Kerr, either on the 17th day of July 1876, or at any other time, in the Third Judicial District Court of Utah Territory, or in any other court, against the said William A. Stephens, trustee, and the said Matthew T. Gisborn, as co-partners or otherwise, in the sum of $4,-
140 313.95, or any other sum, and costs of $87.40 or any other sum, and in like manner denies that on the 18th day of July 1876, or at any other time, the said John W. Kerr, for value received or otherwise, of John W. Simpson, or any other person, did sell, assign, transfer or set over the said judgment or any part thereof, or any interest, title or right therein, or in any judgment whatsoever, to the said John W. Simpson, or that afterwards, on the 19th day of November, 1877, or at any other time, the said John W. Simpson, for value received or otherwise, did assign, sell, transfer or deliver to plaintiff the said judgment, or any right, title or interest therein, and in like manner this defendant denies
141 that no part of the said last named judgment has been paid and denies that plaintiff is now the owner or holder of said judgment or any legal or equitable right therein.

This defendant further answering as to the said second item of indebtedness set forth in the complaint, alleges, that the said cause of action is barred by the statute of limitations of the Territory of Utah ; that the said judgment was rendered, if at all, more than five years before the commencement of this action ; that the time prescribed by law for commencing an action upon said judgment, to-wit : Five years, has expired, since the rendition of said judgment,

and this defendant pleads the said statute of limitations of the Territory of Utah in bar of said second item set forth in the complaint.

Third—As to the third item of indebtedness set forth
142 in the complaint this defendant answers as follows:

He denies that on the 21st day of April 1877, or at any other time, an account was stated between one Mrs. C. L. Torbitt and William A. Stephens as trustee, or that upon such statement of account a balance was found due to the said Mrs C. L. Torbitt of $454.83, or any other sum. Defendant denies that the said Mrs. C. L. Torbitt, did, on the 21st day, of April 1877, or at any other time, sell, assign, transfer or set over in any manner such account stated, if any such account stated existed, to the plaintiff,
143 or that said Willliam A. Stephens, as trustee, or otherwise, agreed to pay the same, and denies, on information and belief, that no part of the said account has been paid, and denies that the plaintiff is the owner or holder thereof, or of any legal or equitable right appertaining to the same.

And defendant alleges and pleads, in answer to said alleged account stated between the said Mrs. C. L. Torbitt and said William A. Stephens, trustee, that the same did not accrue as an indebtedness to the plaintiff, at any time within four years next before the commencement of this action, and defendant pleads the statute of limitations of the Territory of Utah in bar of said claim, and alleges, that more than four years have elapsed since said account stated became due.

Fourth—As to the fourth item of indebtednes set forth
144 in the complaint this defendant answers as follows:

Denies that on the 21st of April, 1877, or at any other time, an account was stated between said William A. Stephens, as trustee, and one George Clark, or that upon such statement a balance of $2,227.37, or any other sum was found due to the said George Clark from the said William A. Stephens, trustee as aforesaid. Denies that the said William A. Stephens, trustee, agreed to pay the said George Clark the said sum, or any other sum whatsoever. Denies that on the 21st day of April, 1877, or at any other time, the said Clark, for value received of plaintiff, or oth-
145 erwise, assigned, transferred, made over or delivered the said account stated to the plaintiff, and this defendant denies that no part of the said account stated, or interest thereon, has been paid, and denies that the plaintiff is the owner or holder thereof, or any legal or equitable right appertaining to the same.

Defendant further answering to the said fourth item of indebtedness, alleges that the said cause of action, if ever any existed, ac-

crued more than four years next before the commencement of this action, and defendant pleads thereto the statute of limitation of the Territory of Utah, that the said cause of action is barred by the statute of limitations, which perscribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing.

146 Fifth—As to the fifth item of indebtedness set forth in the complaint, this defendant answers, as follows:

Denies that on the 24th day of April, 1877, or at any other time, an account was stated between said William A. Stephens, as trustee, and one Edward Stott, or that upon such statement a balance of $172.19, or any other sum, was found due to the said Edward Stott; from the said Stephens, as trustee as aforesaid. Denies that the said William A. Stephens, trustee, agreed to pay the said Stott the said sum or any other sum whatsoever. Denies that on the 24th day of April, 1877, or at any other time, said Stott, for value received of said plaintiff or otherwise assigned,

147 transferred, made over or delivered said account stated to the plaintiff; and this defendant denies that no part of said account or the interest thereon, has been paid, and denies that plaintiff is the owner or holder thereof, or of any legal or equitable right appertaining to the same.

Defendant further answering as to the said fifth item of indebtedness alleges: That the said cause of action, if ever any existed, accrued more than four years next before the commencement of this action, and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges, that the said cause of action is barred by the statute of limitations, which prescribes that such action shall be commenced within four years after such account be-

148 comes due, if in writing, and within two years, if not in writing.

Sixth—As to the sixth item of indebtedness set forth in the complaint, this defendant answers as follows:

Denies that on or about the 24th day of April, 1877, or at any other time, an account was stated between said William A. Stephens, as trustee, and one Owen Long, or that upon such statement a balance of $235, or any other sum, was found due to the said Owen Long, from said Stephens, as trustee as aforesaid. Denies that said Stephens, as such trustee, agreed to pay the said Long said sum, or any sum whatsoever. Denies that on or about said 24th day of April, 1877, said Long for value received of plaintiff, or otherwise, transferred, assigned, set over or delivered said ac-

149 count stated to the plaintiff. Denies that no part of said

account, or of the interest thereon, has been paid, and denies that plaintiff is the owner or holder thereof, or of all or any legal or equitable rights appertaining to the same.

Defendant further answering as to the said sixth item of indebtedness alleges: That the said cause of action, if ever any existed accrued more than four years next before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges, that the said cause of action is barred by the statute of limitations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing.

Seventh—As to the seventh item of indebtedness set
150 forth in the complaint, this defendant answers, as follows:

Denies that on or about the 23rd day of April, 1877, or at any other time, an account was stated between said William A. Stephens, as trustee, and the firm of Thompson & Jurgensen, or that upon such statement a balance of $376.69 was found due to the said Thompson & Jurgensen, from said Stephens, as trustee, as aforesaid; denies that said Stephens, as such trustee, agreed to pay the said Thompson & Jurgensen the said sum or any sum whatsoever. Denies that on or about the 23rd of April, 1877, or at any other time, said Thompson & Jurgensen, for value received of the plaintiff, or otherwise, assigned, transferred, made over or delivered said account stated to the plaintiff; denies that
151 no part of said account or of the interest thereon has been paid. Denies that plaintiff is the owner or holder thereof, or of all or any legal or equitable rights appertaining to the same.

Defendant further answering as to the said seventh item of indebtedness alleges: That the said cause of action, if ever any existed, accrued more than four years before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territoty of Utah, and alleges, that said cause of action is barred by the statutes of limitations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years, if not in writing.

Eighth—As to the eighth item of indebtedness set forth in the complaint, this defendant answers as follows:

Denies that on or about the 23rd day of April 1877, or at any other time, an account was stated between said William A. Stephens, as trustee, and one H. E. Barstow, or that upon such
152 statement a balance of $510 was found due to the said H. E. Barstow from said Stephens, as trustee aforesaid. Denies that said Stephens, as such trustee, agreed to pay the said

Barstow the said sum, or any sum whatsoever. Denies that on or about the said 23rd day of April 1877, the said Barstow, for value received of this plaintiff, or otherwise, assigned, transferred, made over or delivered said account, stated to the plaintiff. Denies that no part of said account, or of any interest thereon has been paid, and denies that plaintiff is the owner or holder thereof, or of all or any legal or equitable rights appertaining to the same.

153 Defendant further answering as to the said eighth item of indebtedness alleges: that the said cause of action, if ever any existed, accrued more than four years before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges, that said cause of action is barred by the statute of limitations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing.

Ninth—As to the ninth item of indebtedness set forth in the complaint, this defendant answers as follows:

154 Denies that on or about the 23rd day of April 1877, or at any other time, an account was stated between said William A. Stephens, as trustee, and the firm of Selig & Simon, or that upon such statement a balance of $1,763.58, or any other sum was found due to the said Selig & Simon from said Stephens, as trustee. Denies that said Stephens, as such trustee, agreed to pay the said Selig & Simon the said sum, or any other sum whatsoever. Denies that on or about the 23rd day of April 1877, or at any other time, the said Selig & Simon, for value received of plaintiff, or otherwise, assigned, transferred, made over or delivered said account stated to the plaintiff. Denies that no part of said account, or of any interest thereon, has been paid; denies that plaintiff is the owner or holder thereof, or of all or any legalor equitable rights appertaining to the same.

155 Defendant further aswering as to the said ninth item of indebtedness, alleges: That the said cause of action, if ever any existed, accrued more than four years before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges, that said cause of action is barred by the statute of limitations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years, if not in writing.

Tenth—As to the tenth item of indebtedness set forth in the complaint, this defendant answers as follows:

Denies that on or about the 24th day of April 1877, or at any other time, an account was stated between said William A.
156 Stephens, as trustee, and one S. P. Teasdel, or that upon such statement a balance of $131.21, or any other sum, was found due to the said S. P. Teasdel, from said Stephens, as trustee. Denies that said Stephens, as such trustee agreed to pay said Teasdel said sum or any sum whatsoever. Denies that on or about said 24th day of April 1877, or at any other time, the said Teasdel, for value received of plaintiff, or otherwise, assigned, transferred, made over or delivered said account stated to the plaintiff; denies that no part of said account, or of any interest thereon, has been paid; and denies that plaintiff is the owner or holder thereof, or of all or any legal or equitable rights appertaining to the same.

Defendant further answering as to the said tenth item of indebtedness, alleges: That the said cause of action, if
157 ever any existed, accrued more than four years before the commencement of this suit, and defendant pleads thereto the statute of limiations of the Territory Utah, and alleges, that said cause of action is barred by the statute of limittations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing.

Eleventh—As to the eleventh item of indebtedness set forth in the complaint, this defendant answers as follows:

Denies that on or about the 14th day of May 1877, or at any other time, an account was stated between said William
158 A. Stephens, as trustee, and one George Clark, or that upon such statement a balance of $1,478.04, or any other sum, was found due to said George Clark from said Stephens, as trustee. Denies that said Stephens, as trustee, agreed to pay the said Clark said sum or any sum whatsoever. Denies that on or about the said 14th day of May 1877, or at any other time, for value received of this plaintiff, or otherwise, said Clark assigned, transferred, made over or delivered said account, stated to the plaintiff. Denies that no part of said account, or of any interest thereon, has been paid, and denies that plaintiff is the owner or holder thereof, or of all or any legal or equitable rights appertaining to the same.

Defendant further answering as to the said eleventh
159 item of indebtednes, alleges: That the said cause of action, if ever any existed, accrued more than four years before the commencement of this suit, and defendant pleads thereto the statutes of limitations of the Territory of Utah, and alleges:

That the said cause of action is barred by the statute of Limitations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years, if not in writing.

Twelfth—As to the twelfth item of indebtedness set forth in the complaint, this defendant answers as follows:

160 Denies that on or about the 3rd day of July, 1877, or at any other time, an account was stated between said William A. Stephens, as trustee, and one George Clark, or that upon such statement a balance of $1,952.44, or any other sum, was found due to said George Clark, from said Stephens, as trustee. Denies that said Stephens, as such trustee, agreed to pay the said Clark the said sum or any other sum whatsoever. Denies that on or about the 3rd day of July, 1877, or at any other time, the said Clark, for value received of plaintiff, or otherwise, assigned, transferred, made over or delivered said account stated to said plaintiff; denies that no part of said account, or of any interest thereon has been paid; denies that this plaintiff is the owner or holder thereof, or of all or any legal or equitable rights appertaining to the same.

161 Defendant further answering as to the said twelfth item of indebtedness, alleges: That the said cause of action, if ever any existed, accrued more than four years next before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges: That the said cause of action is barred by the statutes of limitations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years, if not in writing.

Thirteenth—As to the thirteenth item of indebtedness set forth in the complaint, this defendant answers as follows:

162 Denies that on or about August 16th, 1877, or at any other time, an account was stated between said William A. Stephens, as trustee, and one George Clark, or that upon such statement, a balance of $5,139.88 or any other sum, was found due to the said George Clark, from said Stephens, as trustee. Denies that said Stephens, as such trustee, agreed to pay said Clark the said sum or any sum whatsoever. Denies that on or about said 16th day of August, 1877, said Clark, for value received of plaintiff, or otherwise, transferred, assigned, made over or delivered said account stated to this plaintiff; denies that no part of said account, or of any interest thereon, has been paid; denies that plain-

tiff is the owner or holder thereof, or of all or any legal or equitable rights appertaining the same.

163 Defendant further answering, as to the said thirteenth item of indebtedness, alleges: That the said cause of action, if ever any existed, accrued more than four years next before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges that the said cause of action is barred by the statute of limitations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years, if not in writing.

Fourteenth—As to the fourteenth item of indebtedness set forth in the complaint, this defendant answers as follows:

164 Denies that on or about November 19th, 1877, an account was stated between said William A. Stephens, as trustee, and one George Clark, or that upon such statement a balance of $8,500.90 or any other sum, was found due to the said George Clark, from said Stephens, as trustee. Denies that said Stephens, as trustee, agreed to pay said sum, or any other sum whatsoever. Denies that on or about the 19th day of November, 1877, said Clark, for value received of this plaintiff, or otherwise, transferred, assigned, made over or delivered said account stated to the plaintiff. Denies that of the said several accounts in the complaint alleged to have been stated between said Stephens as trustee, and said George Clark, none of them contained, or was in any wise made up of, any antecedent account stated between the parties.

165 Defendant further answering as to the said fourteenth item of indebtedness, alleges: That the said cause of action, if ever any existed, accrued more than four years next before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges, that the said cause of action is barred by the statute of limitations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing.

This defendant further answering, says that he has no knowledge, information or belief, sufficient to enable him to answer, and therefore, denies that on or about the 12th day of February, 1875, or at any other time, said William A. Stephens, was trustee for Allen, Stephens & Co., or was authorized or empowered by them, as trustee, to endorse, as trustee or otherwise, or to assign or deliver, the said four promissory notes executed by the defendant, set forth in the complaint, or any or either of

them, or was authorized or empowered to assign or deliver any right, title or interest in them or either of them, or equity in them or either of them. Denies, in like manner, that on or about the 12th day of February, 1875, or at any other date, the said William A. Stephens, as such trustee, did, either for value received by said Allen, Stephens & Co., or otherwise, either in the name, style or description of "William A. Stephens, trustee," or otherwise, endorse, in writing or otherwise, or assign or deliver, each or any of said promisory notes to the plaintiff, and denies that the
167 plaintiff ever paid any value to Allen, Stephens & Co., or that Allen, Stephens & Co., ever received any value of the plaintiff for any such claims or notes, and in like manner this defendant denies that on the day and year, last aforesaid, or at any other time, the said Allen, Stephens & Co., either for value received or otherwise, executed or delivered to the plaintiff, or granted, bargained, sold or assigned, transferred or set over, in any manner to the plaintiff, all or any claims or demands, which said Allen, Stephens & Co., had against the said Matthew T. Gisborn, or said Matthew T. Gisborn and Warren Hussey, jointly or individually, either for moneys theretofore loaned or advanced for their joint or individual account, or for any other purpose, or for money loaned or advanced to said William A. Stephens, trustee. Denies
168 in like manner that they assigned all or any promisory notes made by said Matthew T. Gisborn and Warren Hussey to said William A. Stephens, trustee.

Denies in like manner that any transfer or assignment made by Allen, Stephens & Co., to the plaintiff, was designed or intended to cover or include, or did cover or include the said $400,000 mentioned in said declaration of trust, or that it was intended to cover or include any $400,000, or any other sum, or any part of said $400,000, secured by, in or under the terms of said declaration of trust. Denies that the said Allen, Stephens & Co., ever transferred or assigned any of the said four promissory notes, or any part thereof, to the plaintiff, or ever transferred or assigned the other $300,000 mentioned in the declaration of trust, or any part thereof, to the plaintiff.

This defendant upon his information and belief denies the allegation that no part of the said $400,000, or of the interest thereon has been paid, but alleges, on information and belief, that a large amount of ore has been taken out, which should have been applied to the purposes of said trust, and which if properly applied would have nearly or quite paid the whole of the same ; the exact amount of such ore is unknown to this defendant, and he has no

means of alleging the same. This defendant further an-
169 swering again denies that the plaintiff is the holder or owner of said notes or any or either of them, and denies that there are any of said notes which now have any legal existence. Denies that plaintiff is now the holder or owner of all or any of the claims or demands which prior to the transfer to plaintiff by said Allen, Stephens & Co., or said Stephens, as trustee, were held or owned by said Allen, Stephens & Co., jointly or individually, or by said Stephens, as trustee. Denies that plaintiff is the owner or holder of any or all the moneys used by said Stephens, as trustee, or advanced by him as said trustee, to said Gisborn, and denies that plaintiff is the owner or holder of the rights, equities or securities for the payment of the said $400,000, or any part thereof, or that plaintiff has any right, interest, equity, claim or de-
170 mand, in or to any security given for said $400,000, or any interest in the same whatsoever.

Defendant further answering denies that the claims designated in the complaint by numbers running from one to fourteen inclusive, or any of them, or any part of any of them, had been expended by the said trustee on said mine to protect the same, or that he expended the said claims, or any of them, or any part of any of them, at all, ar that he expended the said claims or any of them, or any part of any of them, to make the said mine profitable, or to execute the said trust. Denies that at the last named date, or at or about the beginning of the year 1878, or at any date mentioned in the complaint, the said trustee had no trust funds on hand
171 with which to continue work on said mine.

Defendant denies that the said trustee, at that date, the beginning of the year 1878, could not have raised money upon the said premises, and denies that said premises were then encumbered by any liens for expenditures upon the same, and denies that said trustee was compelled to cease work or explorations on said premises, by any liens upon the same, except said declaration of trust.

This defendant further answering denies that the said trustee in the execution of his trust, had no election but to close out said trust by proper legal proceedings, subjecting the trust estate to sale, or to lease the said premises in such a way that the mines
172 should be explored or developed, and denies that he had any election to close out the said trust estate by legal proceedings, or to subject the said trust estate to sale, or to lease the said premises.

This defendant denies that he ever made any agreement, either

in writing or otherwise, that the delay caused by the lease, should in no way prejudice any of the parties in the execution and winding up of the trust, and denies that he ever made any agreement or contract whatsoever relative to the delay caused by the lease. Denies that in any manner whatsoever he renewed any of the promises against which the statute of limitations otherwise would be running, in the year 1878 or 1879 or at any other time.

Defendant denies on information and belief, that the lessees diligently worked and explored the said premises, or faithfully endeavored to find the vein of ore. This defendant has no knowledge, information or belief sufficient to enable him to answer the allegation that the said lessees expended the sum of $4,000 upon said premises, and therefore denies the same, and leaves the plaintiff to make such proof thereof as it can and is advised is material. Defendant further denies, on information and belief, the allegation in the complaint that the said trustee has not paid any of the said sum secured to be paid under said trust, but alleges, on
173 information and belief that he has paid himself large sums of money mentioned in said declaration of trust by the ore and profits taken from the said mine, the amount of which, as above stated, is unknown to this defendant.

This defendant further answering alleges that the entire transaction relative to the advance of the $400,000 mentioned in the complaint, was made with William A. Stephens alone and exclusively ; that his co-partners, if he had any, had no right, title or interest or claim in the transaction, so far as this defendant was concerned. That the four $25,000 notes described in the complaint, dated April 30th, 1874, were executed and delivered con-
174 ditionally to secure the said William A. Stephens, and evidence the amount of money advanced by him, until such further time as the other owners of the Mono mine could be bought out by this defendant Gisborn, and with the understanding that when those owners were bought out, new writings should
175 be executed to take the place of the said promissory notes.

That in pursuance of that arrangement, when the defendant did procure the other interests in said Mono Silver Mine, this defendant executed the second deed described in the complaint, to-wit: That of date of May 6th, 1874, and the said Stephens, as trustee of this defendant Gisborn, on the 30th day of May, 1874, executed the declaration of trust attached to and made a part of the complaint herein, which said declaration of trust, this defendant also hereby refers to, and makes the same a part of his answer. That it was the agreement at the time of the execution of said declaration of trust

that the notes were merged in the said declaration of trust and cancelled thereby, and that this defendant no longer remained indebted on said notes, or liable at all thereon, or liable in any manner for the said money, in any form, except as the rents, issues and profits of said Mono Mine were liable, in pursuance of said declaration of trust. That the agreement, understanding and intention
176 between the parties was, that never was said $400,000 to be due or payable from this defendant to William A. Stephens, or any other person; that it never was due upon demand, or at any time, but that said Stephens was to look solely and exclusively to the rents, issues and profits of said mine for his said money and interest, and to no other source whatsoever. That the said William A. Stephens entirely abandoned, forsook and ceased working the said mine, on or about December, 1876, and has not worked the said mine or operated it, by himself, his agents or employees, since on or about the 1st day of January, 1877. That the lessees described in the complaint, finally abandoned work on said mine in June 1879. That since the said trustee ceased to work the said mine, he abandoned and relinquished his trusts and rights in said premises, as defendant is advised and believes true.

177 That during the four years next before the commencement of this action, neither the said trustee, nor the plaintiff, nor any person in behalf of either the said trustee or the plaintiff, or in behalf of Allen, Stephens & Co., took any action to enforce or execute said trust, and this defendant alleges, that any cause of action set forth and alleged in the complaint, did not accrue within four years next before the commencement of this action, and defendant pleads to each, all and every cause of action set forth in the complaint, that the same was, at the date of the commencement of this suit, barred by the statute o limitations, of the Territory of Utah. And to each of said four promissory notes set forth in the complaint, defendant pleads that four years have elapsed since each was due, and that each is barred by the statute of limita-
178 tions of Utah Territory; that defendant has been a resident of Utah Territory, continuously from the date of said declaration of trust, to the date of the commencement of this suit.

Wherefore this defent prays to be hence dismissed with his reasonable costs.

ARTHUR BROWN,

Attorney for said defendant.

TERRITORY OF UTAH, }
COUNTY OF SALT LAKE. } ss.

Matthew T. Gisborn, being duly sworn says: I am one of the defendants in this action; I have heard my foregoing separate answer read, and know the contents thereof, and the same is true of my own knowledge, except as to matters therein stated on information and belief, and as to those matters I believe it to be true.

MATTHEW T. GISBORN.

Subscribed and sworn to before me this 24th day of October, 1884.

[SEAL.] A. H. WINN,
Notary Public.

Now comes the said defendant, Matthew T. Gisborn, and, by way of cross-complaint, alleges against the said William A. Stephens, trustee, that on the 30th day of May, 1874, he, said Stephens, executed a certain declaration of trust of the Mono Silver
179 Mine, more particularly described as follows: Being mineral entery No. 105 in the series of the general land office of the United States, designated by the Surveyor General of Utah, as lot No. 46, embracing a portion of the unsurveyed public domain, in the Ophir Mining District, Tooele County, Utah Territory, in the district of lands subject to sale at Salt Lake City, containing three and sixty-seven hundredths [3.67-100] acres of land, more or less, and, acceeding to the returns on file in the General Land Office, bounded, described and platted as follows: With magnetic variation at sixteen [16] degrees, thirty [30] minutes east, to-wit: Beginning at corner No. 1, a post marked No. 1, lot No. 46, thence south eighty-three [83] degrees, thirty minutes east, sixteen hundred [1,600] feet to corner No. 2, a post marked No. 2, lot No. 46, from which a fir tree seventeen [17] inches in diameter, marked B. T. bears north seventy-one [71] degrees, thirty [30] minutes
180 west at the distance of twenty-one and five-tenths [21.5-10] feet; thence from said corner No. 2, north six [6] degrees, thirty [30] minutes east, one hundred [100] feet to corner No. 3, a post marked No 3, lot No. 46, from which a fir tree seventeen [17] inches n diameter, marked B. T., bears north seventy-six [76] degrees west, at the distance of thirteen [13] feet, and U. S. mineral monument No. 6, a fir tree seventeen [17] inches in diameter, marked U. S. M. No. 6 on the south side, and U. S. mineral monument No. 6 on a board nailed on the east side, bears north fifty-

nine [59] degrees west at the distance of four hundred and sixty-two [462] feet; thence from said corner No. 3, north eighty-three [83] degrees, thirty [30] minutes west, sixteen hundred [1,600] feet to corner No. 4, a post marked No. 4, lot No. 46; thence
181 south six [6] degrees thirty [30] minuts west, fifty [50] feet to a point, from which discovery stake bears north eighty-three [83] degrees thirty [30] minutes west, at a distance of eight hundred [800] feet, one hundred [100] feet to the place of beginning which said declaration of trust is hereto attached and made a part hereof.

That prior thereto, at the dates named in said declaration of trust, this defendant, Matthew T. Gisborn, had executed the two deeds therein described, of the entire interest in the said Mono Silver Mine. That after the execution of said declaration of trust the said William A. Stephens, in pursuance thereof, appointed an agent, and this defendant appointed an agent, who worked said Mono Silver Mine in pursuance of the terms of said declaration of trust. That during the month of December, 1876, the
182 said William A. Stephens abandoned the said mine, and relinquished, forsook and abandoned the said trust. That during the said time, to-wit: Between the 30th day of May, 1874, and the month of December, 1876, the said William A. Stephens received large sums of money, enough, or nearly enough, as defendant alleges on information and belief, to re-pay the said William A. Stephens the moneys advanced by him, but the exact amount of said money so advanced this defendant does not know, and has no means of ascertaining; that he has never received any account of the same from his said trustee, William A. Stephens.

That since the said first day of January 1877 the said William A. Stephens has not been in possession of the said property, either by himself, his agents or employees; that this defendant,
183 Matthew T. Gisborn is now in the possession, entitled to the possession, and the owner of the said premises, the Mono Silver Mine.

That the said deeds so as aforesaid executed by this defendant, Matthew T. Gisborn, to the said William A. Stephens, remain of record in the records of Tooele County, Utah Territory, said deed dated April 30th, 1874, being recorded upon pages 33, 34 and 35 of book "R" of the records of Tooele County, Utah Territory, and said deed dated the 6th day of May 1874, being recorded upon pages 83 and 84 of book "R," records of Tooele County, Utah Territory. That the said William A. Stephens has never reconveyed or revested the interest described in said deeds, and the said

deeds are a cloud upon the title of the defendant, Matthew T. Gisborn; that the said William A. Stephens, as this defendant is informed and believes, is now a resident of the City of New York in the State of New York. That the plaintiff, the Charter Oak Life Insurance Company, gives out and pretends to be the owner by assignment of some right, claim or interest acquired by or through the said William A. Stephens, the exact nature of which this defendant does not know further or other than as set out in the complaint in this action. That the other defendants named in the original action, as defendant is informed and believes, have, or claim to have some interest derived by, through or from the said William A. Stephens, to-wit: Herman Blennerhassett, B. F. Allen and Hoyt Sherman as assignee, in bankruptcy of B. F. Allen, bankrupt.

Wherefore this defendant prays that he may have judgment:

First—That the execution of the said trust has been abandoned and relinquished by the said William A. Stephens.

Second—That the said William A. Stephens execute and deliver to this defendant good and sufficient deeds of conveyance of all right, title and interest of, in and to the said Mono Silver Mine and the premises herein described.

Third—That in case of his failure to execute the same that this court will make a decree cancelling the said deeds, in lieu of a conveyance from the said William A. Stephens.

Fourth—For such other and further relief as may be proper in the premises.

Fifth—For costs of suit.

ARTHUR BROWN,
Attorney for said Defendant.

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

Matthew T. Gisborn being duly sworn says: I am one of the defendants in the foregoing action and the defendant in whose behalf the foregoing cross-complaint is interposed; I have heard said cross-complaint read and know the contents thereof, and the same is true of my own knowledge, except as to matters therein stated on information and belief, and as to those matters I believe it to be true.

MATTHEW T. GISBORN.

Subscribed and sworn to before me this 24th day of October, 1884.

[SEAL.] A. H. WINN, Notary Public.

Know all men by these presents, that whereas, Matthew T. Gisborn, of the City of Salt Lake, and Territory of Utah,
187 has by two certain deeds of conveyance, bearing date respectively, April 30th, 1874, and May 6th, 1874, conveyed to me, William A. Stephens, of the City and County of New York, trustee, all of the Mono mining claim and lode, with the tenements, hereditaments and appurtenances thereunto appertaining, situate in Dry Canon, Ophir Mining District, Tooele County and Territory aforesaid, and more particularly described in the survey and application for a patent therefor now pending in the United States Land Office.

Now, as a part of the same transaction, I the said William A. Stephens, trustee as aforesaid, do declare that such conveyance was made and received upon the trusts, nevertheless, and to
188 and for the uses, interests, securities and purposes hereinafter limited, specified, described and declared, that is to say, upon trust, to receive the issues, rents and profits of the said premises, and to apply the same as received, as follows : viz. :

First—To the payment of all expenses of operating said mine, keeping the same with the appurtenances in good condition and repair, transportation of ores, etc., from and after the 30th day of April, 1874, including expenses for the hoisting works on said premises, and current public taxes.

Second—To the payment to me as trustee, of the sum of four hundred thousand dollars [$400,000] advanced by me as trustee, to said Gisborn for the purchase of two thirds undivided of said premises from his late co-tenants, together with interest at the rate of seven per cent. per annum as follows : On $100,000 thereof from and after the said 30th day of April 1874, and on the remaining $300,000 from and after the 30th day of May, 1874.

Third—To the payment to said Matthew T. Gisborn
189 of a sum equal to seven per cent per annum, upon one-third of the net proceeds of said mine, so applied to the payment of said sum of $400,000, and interest as aforesaid, from and after the same shall be so applied, or a like per centage per annum on such portion of one-third of the net proceeds of said property, as said Gisborn shall not have received in the meantime with my consent.

Fourth—And finally to deliver and pay over to said Gisborn, his heirs or assigns, the sum of two hundred and seventy-five thousand [$275,000] dollars, less the amount of net proceeds he
190 may have received as last aforesaid, but exclusively to the interest mentioned last above in sub-division third.

And I, the said William A. Stephens, trustee, as aforesaid, do covenant and agree to and with the said Matthew T. Gisborn, his heirs and assigns, that I shall and will duly apply all the rents, issues and profits of said property to the uses aforesaid, in the order aforesaid, and as soon as the same shall be received by me, and further, that as soon as the said uses shall be fulfilled and discharged, I will cause said conveyance of said premises to me to be cancelled of record, by doing such acts, and executing such instrument as may be necessary to recovery [re-convey] or revert the title to said premises, with the tenements, hereditaments and appurtenances thereto appertaining to and in the said Matthew T. Gisborn, his heirs and assigns, to the same extent and estate, as now held by me, as aforesaid, as trustee. And it is further declared, as one of the terms of said trust, that during the continuance thereof
191 the said premises and property, and all the operations and business pertaining thereto, shall be placed in the management and control of two persons, one of whom shall be selected by the said Matthew T. Gisborn, and the other by myself, and in case of any disagreement between them, in respect to the operation of said mine, as [or] the management of the business pertaining thereto, the two agents so selected shall each select one person, and the matter of difference shall be submitted for decision to the persons so selected as last aforesaid, and in the event that the two alternates so selected as last aforesaid, cannot agree upon a decision of the matter so referred to them, they shall select a third party as an umpire, whose decision shall determine the matter in dispute; the compensation of such agents, and their respective alternates,
192 shall be paid by the party on whose behalf they are selected, respectively, and that of the umpire, if incurred, shall be paid as a current expense of said mine, and it is understood and approved that said Matthew T. Gisborn, doth select and appoint Alexander W. Adams as such managing agent, on his behalf, and that I select and appoint Samuel K. Holman as such managing agent on my behalf, and that any vacancy which may occur in either appointment, shall be filled by the same right of selection on either side, but in no case shall any person, directly or indirectly as contingently interested in said property, be selected for this purpose, but, nevertheless, it is provided and specified, as a further term of said trust, that, in the mean time, on request of said Matthew T. Gisborn, his assigns or legal representatives, I shall and will recovery [re-convey] to such person or persons as he may
193 designate that portion of said mining claim and premises which is situate east of the center of the ravine crossing

said premises, nearest the eastern boundary thereof, which, said ravine, is further designated and identified as one in which a living spring rises, a short distance above the north boundary of said premises, the more exact metes, bounds and extent of such portion to be hereafter described by exact measurement, according to said tokens.

In witness whereof, I have hereunto set my hand and affix my seal this 30th day of May, 1874.

[SEAL.] W. A. STEPHENS,
Trustee.

Attest:
J. B. ROSBOROUGH,
JOHN T. CAINE.

TERRITORY OF UTAH, }
COUNTY OF SALT LAKE. } ss.

On this 13th day of May, A. D. One Thousand Eight
194 Hundred and Seventy-four, before me, John T. Caine, a Notary Public within and for Salt Lake County, in the Territory of Utah, duly elected, commissioned and qualified, personally appeared William A. Stephens, trustee, whose name is subscribed to the annexed instrument, as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument, as a party thereto, and duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, at my office in Salt Lake City, U. T., the day and year in this certificate first above written.

[SEAL.] JOHN T. CAINE,
Notary Public for Salt Lake County,
Utah Territory.

195 Recorded, June 12th, 1874.

[ENDORSED.] Title of Court and Cause. Separate answer of defendant M. T. Gisborn.

ARTHUR BROWN,
Attorney for defendant Gisborn.

[TITLE OF COURT AND CAUSE.]

ANSWER TO COMPLAINT.

Now comes said Defendant William A. Stephens, as trustee, and individually makes this his answer to the complaint in said action above entitled:

Said defendant admits the allegations in said complaint contained and alleges that he has expended for the benefit of said trust-property, and in the working thereof under said deed of trust, all of the proceeds of said property that has come into his hands; that ever since the 30th day of May, 1874, he has devoted much time and attention to the working and preservation of said trust-property and to his duties under said deed of trust called in plaintiff's complaint Exhibit "D," and that he has never received any compensation therefor. That his said services as trustee under and in pursuance of said deed of trust were and are reasonably worth the sum of $5,000.00, which sum should be allowed defendant as compensation therefor.

Wherefore said defendant prays that the Court may allow him the said sum of $5,000.00 as compensation for his said services, and that it may be adjudged to be a first lien on the said premises described in plaintiff's complaint and said Exhibit "D," and that upon a sale of said premises under an order of Court in this action, that the said sum be first paid out of the proceeds of said sale to said defendant.

HALL & MARSHALL,
Attorneys for W. A. Stephens, as Trustee,
and for W. A. Stephens.

TERRITORY OF UTAH,)
COUNTY OF SALT LAKE.) ss.

John A. Marshall being first duly sworn, on his oath states that he is one of the attorneys of defendants making the foregoing answer, that he has read said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true. That his information is derived from written statements made to him by said William A. Stephens. That the reason this verification is not made by said

Stephens is that he is absent from the County of Salt Lake, in Utah Territory, where affiant resides.

JOHN A. MARSHALL.

Subscribed and sworn to before me this 19th day of May, A.D. 1885.

WM. C. HALL,
Notary Public.

[TITLE OF CAUSE.]

Answer of William A. Stephens, as Trustee, and of William A. Stephens.

A copy of the within served on us this the 19th day of May, A.D. 1885.

MARSHALL & ROYLE,
Attorneys for Plaintiff.

Filed May 19th, 1885.

J. M. ZANE, Clerk.

By H. G. MCMILLAN, Deputy Clerk.

HALL & MARSHALL,
Attorneys for Stephens.

TITLE OF COURT AND CAUSE.]

DEMURRER TO CROSS COMPLAINT.

Now comes said plaintiff, "The Charter Oak Life In-
196 surance Company, of Hartford, Connecticut, a body corporate, and demurs to the alleged cross-complaint of said Matthew T. Gisborn, attached to and following the answer of said Gisborn in the above entitled action, for the following reasons, namely:

Because said alleged cross-complaint does not state facts sufficient to constitute a cause of action.

MARSHALL & ROYLE,
Attorneys for said Plaintiff.

[ENDORSED.] Title of Cause. Demurrer to Cross-Complaint of Matthew T. Gisborn.

Minutes Third Judicial District Court.

TUESDAY, April 21st, 1885.

[TITLE OF CAUSE.]

The demurrer of plaintiff to the answer and cross-complaint of defendant Gisborn and the motion of plaintiff to strike out
197 parts of said defendants said answer, having been heretofore argued and submitted, and the court having now fully considered the questions raised, sustains the demurrer and allows the motion, and it is ordered that the said demurrer to the cross-complaint and answer of defendant be and the same is hereby sustained, and it is further ordered that the motion to strike out parts of said defendant's answer be, and the same is hereby allowed. To all of which rulings and orders said defendant by his attorney excepts; and asking therefor, is allowed fifteen days to elect in the premises.

[TITLE OF COURT AND CAUSE.]

AMENDMENT TO DEFENDANT GISBORN'S CROSS-COMPLAINT.

And now comes said defendant Matthew T. Gisborn, and by leave of the court and files this amendment to his cross-complaint in this action.

Defendant amends by inserting in line fifteen, on page thirty, after the word "trust" and before the word "that," the
198 following: That in the winter of 1874, or spring of 1875, during the progress of the working of said mine, what is commonly known as a fault in the ore vein was encountered, and the continuity thereof found to be broken; and the mine which, up to this time, had been immensely profitable, at once ceased to pay expenses. That said fault or displacement of the vein, at first thought be but slight, was found to be of so great an extent that the trustee deemed the mine valueless, and very shortly
198 thereafterceased his efforts to re-discover said vein, and ceased absolutely towork the said mine."

ARTHUR BROWN,
Attorney for Defendant Gisborn.

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE }

Arthur Brown, being first duly sworn on his oath says: I am the attorney for the defendant Matthew T. Gisborn in this action: I have read the foregoing amendment to the cross-complaint and know the contents thereof, and that the same is true. That the reason why this verification is not made by said defendant is that he is absent from the County of Salt Lake in which County I reside.

ARTHUR BROWN.

Subscribed and sworn to before me this 30th day of April, 1885.
[SEAL.] E. B. CRITCHLOW,
Notary Public.

[ENDORSED.] Title of Court and Cause. Defendant Gisborn's Amendment to Cross-Complaint.
Filed May 1st, 1885.

[TITLE OF COURT AND CAUSE.]

DEMURRER TO AMENDED CROSS-COMPLAINT.

Now comes said plaintiff and demurs to said amended cross-complaint of said Matthew T. Gisborn, and for ground of demurrer says:

That said amended cross-complaint does not state facts
200 sufficient to constitute a cause of action.

MARSHALL & ROYLE,
Attorneys for Plaintiff.

[ENDORSED.] Title of Cause. Copy of demurrer to amended cross-complaint.

Third Judicial District Court, Utah.

MONDAY, May 4th, 1885.

[TITLE OF CAUSE.]

The demurrer of said plaintiff to the amended cross-complaint of the defendant, M. T. Gisborn, having been submitted to the court and the court having now fully considered the same and being now of the opinion that the same ought to be sustained.

201 It is ordered that said demurrer be, and the same is hereby sustained, to which ruling and order said defendant excepts.

[TITLE OF COURT AND CAUSE.]

DEFENDANT GISBORN'S BILL OF EXCEPTIONS TO MOTION TO STRIKE OUT.

Be it known that the following exceptions were taken

202 in said cause, to-wit:

That after the issue was joined by the filing of the answer herein, to-wit: On the 3rd day of November, 1884, Marshall & Royle, attorneys for the plaintiff, served upon Arthur Brown, attorney for the defendant Matthew T. Gisborn, the following motion to strike out, to-wit:

[TITLE OF COURT AND CAUSE.]

Now comes said plaintiff in the above entitled action, and moves the Court to strike out of the answer of said defendant Matthew T. Gisborn, each of the following described portions thereof, to-wit:

First—The last line on page eight and from the first to

203 the eighth lines inclusive of the first and eighth lines on page nine of said answer.

Second—All of said answer between the lines ten and twenty on page ten.

Third—All of said answer between the eighth and sixteenth lines on page eleven.

Fourth—All of said answer between the sixth and fifteenth lines on page twelve.

Fifth—All of said answer between the sixth and fifteenth lines on page thirteen.

Sixth—All of said answer between the third and twelfth lines on page fourteen.

Seventh—All of said answer between the second and eleventh lines on page fifteen.

204 Eighth—All of said answer on page sixteen down to the ninth line thereof.

Ninth—All of said answer on page seventeen down to the ninth line thereof.

Tenth—All of said answer on page eighteen down to the ninth line thereof.

Eleventh—All of said answer on page nineteen down to the ninth line thereof.

Twelfth—All of said answer on page twenty down to the ninth line thereof.

Thirteenth—All of said answer on page twenty-one down to the ninth line thereof.

Fourteenth—The last two lines on page twenty-one and the first six lines on page twenty-two of said answer.

205 Fifteenth—All of said answer embraced between the first line on page twenty-eight, and the words "wherefore this defendant prays, etc." on the same page of said answer. Because each of said portions of said answer hereinbefore designated is sham, irrelevant and redundant.

MARSHALL & ROYLE,
Attorneys for plaintiff.

That said motion came on to be heard before the said court in term time, on the 18th day of April, 1885. After hearing the arguments of counsel the same was duly considered by the court and on the 21st day of April, 1885, the court decided and rendered its opinion as follows: That the said part of the answer described in said motion should be stricken out as immaterial and redundant, and not constituting a defence, and that defendant Gisborn could not, in this action, interpose the defence of the statute of limitations. Which opinion so given in rendering said decision is hereto attached and made a part hereof. That accordingly an order

206 was made by the Court, striking out from said answer the following parts, to-wit:

First—On page eight, the last line, and the first eight lines on page nine, as follows: "Defendant further answering, as to said first item, alleges: That the said item of expense is barred by the statute of limitations and the defendant pleads the same thereto. That the said judgment, set forth in the complaint, in favor of Britton,

Grey and Drummond, was rendered more than five years before the commencement of this action, and that the said judgment is barred by the statute of limitations of the Territory of Utah, limit-
207 ing the right of action thereon to a period of five years, which said statute this defendant pleads in bar of said first item set forth in the complaint."

Second—Lines ten to twenty on page ten, as follows:

"This defendant further answering as to the second item of indebtedness, set forth in the complaint, alleges, that the said cause of action is barred by the statute of limitations of the Territory of Utah; that the said judgment was rendered, if at all, more than five years before the commencement of this action; That the time prescribed by law for commencing an action upon said judgement, to-wit: Five years has expired since the rendition of said
208 judgment, and this defendant pleads the said statute of limitations of the Territory of Utah in bar of said second item set forth in the complaint."

Third—Lines eight to sixteen on page eleven as follows:

"And defendant alleges and pleads in answer to said account stated between the said Mrs. C. L. Torbitt and said William A. Stephens, trustee, that the same did not accrue as an indebtedness to the plaintiff, any time within four years next before the commencement of this action, and defendant pleads the statute of limitations of the Territory of Utah, in bar of said claim, and alleges that more than four years have elapsed since said account stated became due."

209 Fourth—Lines six to fifteen on page twelve, as fol-lows:

"Defendant further answering as to said fourth item of indebtedness alleges that the said cause of action, if ever any existed, accrued more than four years next before the commencement of this action and defendant pleads thereto the statute of limitations of the Territory of Utah, that the said cause of action is barred by the statute of limitations which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing."

210 Fifth—Lines six to fiteen on page thirteen as follows:

"Defendant further answering as to the said fifth item of indebtedness alleges: That the said cause of action if ever any existed accrued more than four years next before the commencement of this action, and defendant pleads thereto the statute of limitations of the Territory of Utah and alleges that the said cause of action is barred by the statute of limitations, which prescribes that such ac-

tion shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing."

Sixth—Lines three to twelve on page fourteen as follows:

"Defendant further answering as to the said sixth item of indebtedness alleges: That the said cause of action, if ever any existed, accrued more than four years next before the commencement of this suit, and defendant pleads thereto the statute of limit-
211 ations of the Territory of Utah, and alleges that the said cause of action is barred by the statute of limitations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing."

Seventh—Lines two to eleven on page fifteen as follows:

"Defendant further answering as to the said seventh item of indebtedness alleges: That the said cause of action, if ever any existed, accrued more than four years before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges that said cause of action is barred by the statute of limitations, which prescribes that such action shall
212 be commenced within four years after such account becomes due, if in writing, and within two years if not in writing."

Eighth—First nine lines on page sixteen as follows:

"Defendant further answering as to the said eighth item of indebtedness alleges: That the said cause of action, if ever any existed accrued more than four years before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges that said cause of action is barred by the statute of limitations which prescribes that such action shall
213 be commenced within four years after such account becomes due, if in writing, and within two years, if not in writing."

Ninth—First nine lines on page seventeen as follows:

"Defendant further answering as the said ninth item of indebtedness alleges: That the said cause of action, if ever any existed, accrued more than four years before the commencement of this suit and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges that said cause of action is barred by
214 the statute of limitations which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years, if not in writing."

Tenth—Line one to nine, page eighteen as follows :

"Defendant further answering as to the said tenth item of indebtedness alleges : That the said cause of action, if ever any existed, accrued more than four years before the commencement of this suit and defendant pleads thereto the statute of limitations of the Territory of Utah, and alleges that said cause of action is barred by the statute of limitations which prescribes that such
215 action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing."

Eleventh—First nine lines on page nineteen as follows :

"Defendant further answering as to the said eleventh item of indebtedness alleges : That the said cause of action, if ever any existed, accrued more than four years before the commencement of this action and defendant pleads thereto the statute of limitations of the Territory of Utah and alleges that the said cause of action is barred by the statute of limitations, which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing."

Twelfth—First nine lines on page twenty, as follows: "Defendant further answering as to the said twelfth item of indebted-
216 ness, alleges: that said cause of action, if ever any existed, accrued more than four years next before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territory of Utah and alleges that the said cause of action is barred by the statute of limitations which prescribes that such action shall be commenced four years after such account becomes due, if in writing, and within two years if not in writing."

Thirteenth—First nine lines on page twenty-one, as follows:

"Defendant further answering as to the said thirteenth item of indebtedness, alleges: That the said cause of action, if ever any existed, accrued more than four years next before the commencement of this suit, and defendant pleads thereto the statute of limi-
217 tations of the Territory of Utah, and alleges that the said cause of action is barred by the statute of limitations which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing."

Fourteenth—Last two lines on page twenty-one, and first six lines on page twenty-two, as follows:

"Defendant further answering as to the said fourteenth item of

indebtedness, alleges: That the said cause of action, if ever any existed, accrued more than four years next before the commencement of this suit, and defendant pleads thereto the statute of limitations of the Territory of Utah and alleges that the said cause of action is barred by the statue of limitations which prescribes that such action shall be commenced within four years after such account becomes due, if in writing, and within two years if not in writing."

Fifteenth—All of answer between first line on page
218 twenty-eight and words wherefore defendant prays, etc.; as follows:

"That during the four years next before the commencement of this action, neither the said trustee nor the plaintiff nor any person in behalf of either the said trustee or the plaintiff or in behalf of Allen Stephens & Co., took any action to enforce this trust and this defendant alleges that any cause of action set forth and alleged in the complaint did not accrue within four years next before the commencement of this action, and defendant pleads to each, all and every cause of action set forth in the complaint that the
219 same was at the date of the commencement of this suit barred by the statute of limitations of the Territory of Utah. And to each of said four promissory notes set forth in the complaint, defendant pleads that four years have elapsed since each was due, and that each is barred by the statute of limitations of Utah Territory: That defendant has been a resident of Utah Territory continuously, from the date of said declaration of trust to the date of the commencement of this suit."

That to the said order so made by the court striking out the aforesaid parts of the said answer, counsel for said defendant, Matthew T. Gisborn, did then and there except, which
220 exception was then and there duly allowed by the court. And the said defendant, Matthew T. Gisborn, assigns as error the said ruling; that the court erred in granting said motion to strike out material parts of said answer, and deciding that the same were not material to his defense in said action, and in holding that he had no right to plead the statute of limitations in said action.

Whereas, the aforesaid matters appear to be suitable to be incorporated in a bill of exceptions. Now, therefore, the Hon. Charles S. Zane, Judge of said District Court, has signed this Bill of Exceptions, this 30th day of April, 1885, to which time the time for presenting and preparing the said Bill of Exceptions was duly extended.

C. S. ZANE,
Judge.

[TITLE OF COURT AND CAUSE.]

DECISION OF THE COURT.

221 In this case of the Charter Oak Life Insurance Co., against Wm. A. Stephens, et al, I am of the opinion that under the deeds to Stephens, and the declaration of trust, and the facts alleged in the bill, that Stephens held this property not only in trust for Gisborn, but in trust to pay the indebtedness of $400,000 and the expenditures made in operating and working the mine. That being so, I am of the opinion that Mr. Stephens could not abandon this trust without the consent of the holders of this indebtedness.

I am further of the opinion that holding this in trust as he did under the allegations of the answer to the bill, Gisborn cannot plead the statute of limitations; particularly as the plaintiff does not ask any judgment against him, nor could Stephens
222 because he has not paid this indebtedness according to the express provisions of the trust, or because he has been unable to do so; nor has he attempted to plead the statute of limitations, and Gisborn in my opinion could not plead it for him.

The demurrer therefore to the cross-complaint is sustained, and the motion to strike out the portions of the answer specified in the motion is allowed.

[ENDORSED.] Title of Court and Cause. Defendant Gisborn's Bill of Exceptions on motion to strike out.

Filed May 1st, 1885.

[TITLE OF COURT AND CAUSE.]

AMENDMENT TO ANSWER.

Now comes the said defendant M. T. Gisborn, and
223 by leave of court files this amendment to the answer heretofore filed in this cause, and in addition thereto, not waving the former answer or any part thereof, this defendant alleges that during the period that the trustee mentioned in the complaint was operating the said mine, to wit: During the fall of 1874, this defendant furnished a large amount of money, and paid a large amount of money toward the expenses of running the said mine, which class of expenses are mentioned in the first subdivision

of the declaration of trust. That this defendant expended for such necessary expenses, the sum of of five thousand seven hundred dollars ($5,700.00), and this defendant asks that if any accounting is had in this cause, any judgment of accounting be
224 rendered, that the said sum of five thousand seven hundred dollars ($5,700.00), and interest be awarded to this defendant out of the proceeds of any money that may be realized by this procedure.

That the right of the said defendant to the said five thousand and seven hundred dollars ($5,700.00) advanced by him with interest thereon at the rate of 10 per cent. be adjudged, prior in point of time to the claim of said plaintiff for four thousand dollars ($4,000.00) and interest thereon.

That it may be adjudged an account for expenses pro rata with the other account of expenses to be paid out of the first proceeds.

ARTHUR BROWN,
Attorney for Defendants.

TERRITORY OF UTAH, }
COUNTY OF SALT LAKE. } ss.

M. T. Gisborn being first duly sworn, deposes and says: I am the defendant above named, and have read the fore-
225 going amendment to the answer heretofore filed in said cause, and know the contents thereof, and the same is true of my own knowledge, except as to matters therein stated upon information and belief, and as to these matters I believe it to be true.

M. T. GISBORN.

Subscribed and sworn to before me this 11th day of May, 1886.

E. B. CRITCHLOW,
Notary Public, Salt Lake County.

[ENDORSED.] Title of Court and Cause. Amendment to answer of defendant, Gisborn.
Filed May 11th, 1886.

[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

TERRITORY OF UTAH, }
COUNTY OF SALT LAKE. } ss.

This cause having been called regularly for trial before the court, Marshall & Royle appeared as attorneys for said plaintiff, and Messrs. Arthur Brown, E. B. Critchlow and Lyttleton Price appeared as attorneys for said defendant, Matthew T. Gis-
226 born, and Messrs. Hall and Marshall appeared as attorneys for said William A. Stephens, and said other defendants above named, although duly served with process, came not, but made default, and such default was upon motion of plaintiff's attorneys duly entered by the court.

And the court having heard the proofs of the respective parties appearing as aforesaid, and having considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

FIRST.

That on the 24th day of February, A. D. 1874, Obadiah Embody, Warren D. Heaton, William E. Miller and
227 Matthew T. Gisborn, were, as tennants in common therein subject only to the paramount title of the United States, the owners of, in the possession of, and entitled to the possession of the said premises described in said complaint, and designated therein as the Mono Silver Mine; the said Gisborn owning an undivided interest therein of one-third part thereof, and said other co-tenants together owning the other two-thirds parts thereof.

SECOND.

That on or about said last named date certain negotiations took place between said Gisborn and his said co-tenants in regard to said mining premises, and certain papers had been, or were ex-
228 ecuted by said co-tenants giving said Gisborn the option of purchasing said premises on certain terms, and said Gisborn was desirous of purchasing the same, and not having money of his own, with which to do so, borrowed the money to purchase the same as hereinafter set forth, and with the aid of the money so borrowed, said Gisborn did purchase and pay for the said interests of his said co-tenants in said premises; on the 30th day of April, A.

D. 1874, in the City of New York, paying one of said co-tenants for his interest in said premises the sum of $100,000, and on the 30th day of May, A. D. 1874, at Salt Lake City, Utah, paying the other co-tenants for their interests in said premises, the sum of $300,000; and the title to said two-thirds interest in said premises so purchased and paid for by said Gisborn, was duly conveyed to and vested in said Gisborn, by the said deed a copy of
229 which is attached to said complaint, and marked "Exhibit A," which bears date, February 24th, A. D. 1874, which was duly delivered to said Gisborn, who caused the same to be recorded in the Recorders Office of the County of Tooele, in the Territory of Utah, on the 12th day of June, A. D. 1874, at the same time that the declaration of trust hereinafter mentioned was recorded in the same office.

THIRD.

That the said Gisborn, to enable him to pay for the said interests in and to said mining premises so as aforesaid purchased by him, solicited and obtained a loan from said William A. Stephens, trustee, of the sum of $400,000; and did therewith purchase and pay for said interests, said Stephens, trustee, advancing $100,000 thereof to said Gisborn to be paid to, and which was paid to one of said co-tenants in said City of New York, on the 30th day of April, A. D. 1874. And on May 30th, A. D. 1874, at said City of Salt Lake, said Stephens, trustee, advanced and paid to said Gisborn, or to said tenants in common, their being paid by Gisborn at Gisborn's request, the further sum of $300,000. That the said loan of $100,000 made in the City of New York, was at the time evi-
130 denced by the four promissory notes executed and delivered by said Gisborn and said Hussey to said Stephens, trustee, the originals of which notes are attached to the interrogatives propounded to said Stephens in this case, and copies of which are set out in this complaint in this action, and which is the same $100,000 mentioned in the said declaration of trust (hereinafter mentioned) as constituting a part of the $400,000 named therein. That said four promissory notes werewhen delivered to said Stephens, trustee, by him as trustee assigned and delivered to
231 said Allen, Stephens & Co.

FOURTH.

That said Stephens, trustee, in said transactions with said Gisborn, and in arranging and fixing the terms of said loan, and in making said loan of $400,000 to said Gisborn, was acting as trustee

for, and was trustee for said Allen, Stephens & Co. That said Allen, Stephens & Co., owned and advanced the said $400,000 loaned to said Gisborn, that said Stephens was their trustee in that transaction, and as such trustee, made said loan to said Gisborn, for them and on their behalf. And the security therefor was taken for their use and benefit. That B. F. Allen, William A.
232 Stephens and Herman Blennerhassett were the co-partners comprising said firm of Allen, Stephens & Co.

FIFTH.

That for the purpose of evitlencing the said indebtedness of said Gisborn to said Stephens as trustee, as aforesaid, and the terms upon which the sum was to be repaid, and to provide security for the repayment thereof to said Stephens as such trustee, to provide for expenses, and after the payment of the foregoing, also to provide for the payment of other sums of money, three certain writings under seal were made and entered into between said Stephens, trustee, and said Gisborn. That these three instruments of writing bore different dates, but it was intended and agreed between said Stephens, trustee, and said Gisborn, that said three instruments of writing were to be, and were to be taken and construed together to be, one transaction so far as these writings evidenced
233 the same; true copies of which said instruments in writing are attached to said complaint and made a part thereof, and marked respectively, "Exhibit B," "Exhibit C," and "Exhibit D." That by the said deeds, from said Gisborn to said Stephens, trustee, which were duly recorded in the Recorder's Office of said County of Tooele, and copies of which were attached to said complaint and marked respectively, "Exhibit B" and "Exhibit C," said Stephens as trustee, acquired the legal title to all that certain real estate and mining claim set out by metes and bounds in said complaint and therein designated as commonly known and
234 called the Mono Silver Mine, with the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remained and remainders, rents, issues and profits thereof; also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights priviliges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed. That by said instrument, in writing from said Stephens, trustee, which was also duly recorded as herein before set forth, a copy of which instruments in writing is attached to said complaint, marked "Exhibit D," certain terms and conditions were made known and declared, of the trust

upon, and under which said Stephens as trustee, acquired
235 said legal title to the property mentioned in said deed, copies of which are marked respectively "Exhibit B" and "Exhibit C."

SIXTH.

That in conformity to the terms of said trust, the said trustee entered upon the execution thereof upon the 30th day of May, A. D. 1874, and has continued to perform the duties of his trust with reasonable care and diligence, and as far as under the circumstances he was able to do so, from that date until the commencement of this suit. That for some little time after the said 30th day of May, A. D. 1874, and after the commencement of mining on said Mono Silver Mine the mine paid something, and in the month of July, 1874, Holman and Adams, the agents named in said declaration of trust, remitted to the said trustee in New York City, $20,000; which sum less expenses advanced, amounting $4,510.66-100; To-wit:
236 the sum of $15,489.34-100, was by said trustee paid upon said indebtedness to Allen, Stephens & Co. That soon after said last named date, a fault was discovered in the vein that was being worked, the ore body which had continued down to that period was cut off and disappeared, and said mine ceased yeilding ore in quantities sufficient to pay for working.

SEVENTH.

That under the circumstances mentioned in the last part of finding six, it was the duty of said trustee to use all reasonable efforts to find the displaced ore body in said mine, and to raise money and incur debts for that purpose to a reasonable amount, the value of the property as security for the indebtedness upon it being considered in fixing such reasonable amount; that for such
237 purpose said trustee did from time to time raise money to be expended, and which was expended on said property, and incurred debts in working said property and preserving the same, up to some time in the year 1877, and to the following amounts to-wit: The amount for which judgment was rendered, July 17th, A. D. 1876, in favor of John W. Kerr, plaintiff, against William A. Stephens, trustee, and Matthew T. Gisborn sued in that action in this court as co-partners, doing business under the firm name and style of the Mono Mining Company, defendants. Judgment and costs amounting to $4,401.35, which said judgment in the year 1876, was, in writing, sold, assigned and transferred to one John W. Simpson for value received, and by him for value re-

ceived, and in the year 1877, in writing sold, assigned and transferred to said plaintiff, who now owns the same. Also
238 the following amounts evidenced by accounts stated in writing between said Stephens, trustee, and each creditor authenticated and approved in writing thereon by said trustee, and said Gisborn as manager for said trustee, and bearing date, as to the time when the same was stated as now in each case set forth, to-wit:

Indebtedness to Mrs. C. L. Torbitt, account stated April 21st, 1877, amount, $454.83; indebtedness to George Clark, account stated April 21st, 1877, amount, $2,227.37; indebtedness to Edward Stott, account stated April 24, 1877, amount, $172.19; indebtedness to Owen Long, account stated April 24th, 1877, amount, $235.00; indebtedness to Thompson & Jurgensen, ac-
239 count stated April 23rd, 1877, amount, $375.69; indebtedness to H. E. Barstow, account stated April 23rd, 1877, amount, $510.00; indebtedness to Selig & Simon, account stated April 23rd, 1877, amount, $1,763.58; indebtedness to S. P. Teasdel, account stated April 24th, 1876, amount, $131.12; indebtedness to George Clark, account stated May 14th, 1877, amount, $1,478.04; indebtedness to George Clark, account stated July 3rd, 1877, amount, $1,952.44; indebtedness to George Clark, account stated August 16th, 1877, amount $5,139.88; indebtedness to George
240 Clark, amount stated November 19, 1877, amount $8,500.90. That on or about the date at which each of said accounts was stated, the creditor therein, in writing and for value received transferred and delivered the same to said plaintiff, who now owns and holds the same.

That of the said several accounts so as aforesaid stated between said Stephens, trustee, and said George Clark, none of them contained, or was in any wise made up of, any antecedent account stated between the parties. That under the terms of said trust and the circumstances surrounding said trustee as aforesaid, all the indebtedness of said trustee mentioned in this finding was properly incurred by said trustee in operating said mine and keeping and endeavoring to keep the same in repair; and that the said indebtedness was incurred with the advice, consent and approval of said Gisborn.

EIGHTH.

That no judgment was rendered in this court in favor of said Britton, Grey & Drummond, plaintiffs, against said William
241 A. Stephens, trustee, defendant, for said sum of $2,680.00,

or any other sum; and there being no judgment, there was no assignment thereof to said Simpson, or to plaintiff.

NINTH.

That in the year 1877. said trustee had faithfully endeavored to execute his said trust, had exhausted the means at his command and his credit as trustee, in trying to find the lost vein of ore in said mine, to the end that this same might be worked with profit and the debts and incumbrances thereon paid out of said profits, and had solicited aid and help from said Gisborn to pay the indebtedness incurred, fully advising said Gisborn at the time of these facts; but the lost vein of ore was not found, and said Gisborn notified said trustee that he could not pay any of the debts.

TENTH.

That in 1878 and 1879, said trustee, that work and development might be done on said mine, and in the hope of finding the lost vein without further expense to the trust,
242 leased said mine, with the consent and approval of said Gisborn, and with the agreements in writing from said Gisborn upon said leases stated in said complaint. That the work under said leases, was well and faithfully done, and was approved by said Gisborn and said trustee, but the lost vein was not there, nor has it since been found. Work on said mine proved unprofitable, and said lessees lost money under their leases.

ELEVENTH.

That on the 12th day of February, A. D. 1875, said Allen Stephens & Co., for value received of the plaintiff in this action, and by means of a certain writing by them executed and delivered to plaintiff, granted, bargained, sold, assigned, transferred and set over unto said plaintiff and its assigns, all claims and demands which they had against said Gisborn and said Hussey,
243 jointly or individually, for moneys theretofore loaned and advanced by them to said Stephens, trustee, for said Gisborn and Hussey, upon their joints or individual account, together with all promissory notes made by said Gisborn and Hussey to said Stephens, trustee, to secure portions of said indebtedness. That this assignment embraced the said loan of said Stephens, trustee, to said Gisborn of said $400,000 hereinbefore mentioned; $100,000 of which sum bears interest at the rate of seven per cent. per annum from and after the 30th day of April, A. D. 1874; and $300,000 of

said sum bears interest at the rate of seven per cent. per annum from and after the 30th day of May, A. D. 1874.

TWELFTH.

That said Gisborn has not advanced any money to said trustee in the execution of said trust, or any money chargeable in
244 this action upon said trust estate.

THIRTEENTH.

That there is no evidence of any agreement that said trustee should be compensated for his services as such trustee, or of the value of the services so rendered.

FOURTEENTH.

That said trustee has not at any time abandoned, or intended to give up or forsake, his said trust, or said property conveyed in trust, or any of the duties or obligations resting on him in any way as trustee as aforesaid. That on the contrary, said trustee
245 faithfully executed his trust so far as he could do so, and when he was unable to do more, notified the beneficiaries in said trust of that fact.

FIFTEENTH.

That there are no longer any rents, issues and profits to be obtained from said mining premises with which to pay the indebtness aforesaid, secured to be paid as aforesaid, and that plaintiff will be remediless in securing the indebtness now held by it unless said mining property, so deeded in trust as aforesaid is sold to satisfy the same.

That it was the intention of said Gisborn and said Stephens in creating said trust, that if it became necessary to pay the indebtedness, future and prospective, profits should be realized by the sale of said real estate—the said mine and mining premises: That the words in said trust, "the issues, rents and profits of this
246 said premises," in a court of equity, under the facts in this case, carries the right and power of the court to order and decree a sale of said premises to satisfy the heirs therein. That said trustee is now entitled to the use of said properiy, but the use thereof, without some profit springing therefrom, is of no value, the equity of redemption, or reversionary interest in said premises,

after the payment of the liens upon the same, or upon the use of the same, is also valueless, unless the profits therefrom are sufficient to discharge these liens: While delay increases the debt and the lien by the accumulation of interest, and these things being so, it is for the best interest of all parties that the said premises should be sold and the proceeds applied to paying off the liens, in the
247 order specified in said declaration of trust, and if after such payment any residue remains, then the same to be paid to the parties entitled thereto in their proper order.

SIXTEENTH.

That on said first lease mentioned as having been made by said trustee, said Gisborn made the following indorsement, to-wit: "In consideration of the premises aforesaid, and for value received, I do hereby authorize, ratify and confirm the foregoing lease.

MATTHEW T. GISBORN."

And on the second of said leases made the following indorsement, to-wit: "In consideration of the premises aforesaid, and for value received, I do hereby endorse my signature upon said lease, and I do hereby authorize, ratify and confirm the foregoing lease.

MATT. T. GISBORN."

Said first lease is in this case marked "Exhibit X 12,
248 A. S. P.," and said second lease marked "Exhibit X 13, A. S. P.," and the same are here referred to for the contents thereof.

SEVENTEENTH.

That the said several items of indebtedness hereinbefore mentioned in finding No. Seven, severally bear interest at the rate of ten per cent. per annum,—the said judgment from and after the date of the rendition thereof,—and said several accounts stated, from and after the date they were severally stated. And
249 these items, amount of principal, amount of interest, and totals are now found to be as follows, to-wit:

Name Identifying.	Am't of Principal	Am't of Interest.	Total.
Said Kerr Judgment, ...	$4401.35	$4327.98	$ 8729.33
Mr. C. L. Torbitt, ...	454.83	412.98	867.81
George Clark, ...	2227.37	2022.55	4249.92
Edward Stott, ...	172.19	156.21	328.41
Owen Long, ...	235.00	213.20	448.20
Thompson & Jurgensen, . . .	376.79	341.82	718.51
H. S. Barstow, ...	510.00	462.81	972.81
Selig & Simon, ...	1763.58	1600.42	3364.00
S. P. Teasdel, ...	131.12	118.93	250.05
George Clark, ...	1478.05	1332.70	2810.75
George Clark, ...	1952.44	1733.87	3685.91
George Clark, ...	5139.88	4501.67	9641.55
George Clark, ...	8500.90	7228.15	15729.05
Total principal and interest on the above,			$51,796.30

Which said indebtedness is due and payable to plaintiff
250 the owner and holder of said claims, and no part thereof has been paid, that the same is the first lien upon the realty according to the order prescribed in said declaration of trust.

EIGHTEENTH.

That the principal and interest of the one hundred thousand dollars mentioned in said declaration of trust, (which commenced as therein specified to bear interest from and after April 30th, A. D. 1874,) from April 30th, 1874, until July 1st, 1874, when the payment was made mentioned in Finding No. 6, amounted to $111,666.66
That in July said payment was made amounting to 15,489.34

Leaving a balance thereon, July 1st, 1874, of $ 96,177.32
That the interest thereon, up to the date of judgment, amounts to 74,056.53

And principal and interest, May 20, 1886, amounts to $170,233.85

That the interest upon the $300,000.00 mentioned in said declaration of trust, from and after May 30th, A. D. 1874, until May 20th, A. D. 1886, at the rate of 7 per cent. per annum, amounts
251 to the sum of $251,416.00
which added to the principal of 300,000.00

makes on May 20th, A. D. 1886, a total of $551,416.00
which added to the balance of the principal and interest due on the $100,000.00 item, on May 20th, A. D. 1886, amounting to the sum of 170.233.85

makes on May 20th, A. D. 1886, a balance of . . . $721,649.85

which is due and owing to and should be paid to plaintiff, but no part of which has been paid, and the same is the second lien upon said realty, and upon the satisfaction of this first lien, should then be satisfied as the second lien on said premises.

NINETEENTH.

That outside of the findings of fact hereinbefore made,
252 the Court further finds, as to any other matter stated in the pleadings, that the allegations and averments in plaintiff's complaint are true, and those in the answer untrue.

AS CONCLUSIONS OF LAW

From the foregoing facts, the Court now hereby finds and decides:

That said William A. Stephens, as trustee as aforesaid, still holds the legal title to said mining premises mentioned and described in said complaint.

That said plaintiff, as the legal and rightful owner and
253 holder of said indebtedness, incurred for the expenses authorized by said trust, which is still a subsisting indebtedness, and which now, with interest, amounts in the aggregate to the sum of $51,796.30, is entitled for satisfaction thereof to a first lien upon so much of said premises as lie west of the center of the ravine crossing said premises nearest to the eastern boundary thereof, which ravine is further designated and identified as the one in which a living spring rises, a short distance above the north
254 boundary of said premises.

That said plaintiff, as the rightful and legal owner and holder of said indebtedness, which arose out of the loan to said Gisborn to enable him to buy out the interest in said premises of his cotenants Embody, Heaton and Miller, the balance on which is still a subsisting indebtedness, and which now, with the interest thereon, amounts to the sum of $721,649.85, is entitled for satisfaction thereof to the second lien on said entire premises lying west of said ravine as aforesaid.

That plaintiff is entitled to a decree of this court sub-
255 jecting said entire premises west of said ravine as aforesaid to sale, for the satisfaction of said indebtedness, according to the priorities aforesaid and the prayer of said complaint; and for costs of suit.

Judgment and decree is hereby ordered to be entered accordingly, this, the 20th day of May, A. D. 1886.

By the Court, C. S. ZANE,

Judge of said Court.

[ENDORSED.] Title of Cause. Findings of fact and conclusions of law.

Filed May 20th, 1886.

J. M. ZANE, Clerk.

By H. G. MCMILLAN, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

DECREE.

256

This cause having been regularly called and tried by the Court, Marshall & Royle appearing as attorneys for said plaintiff, and Arthur Brown, E. B. Critchlow and Littleton Price, Esqrs., appearing as attorneys for said Matthew T. Gisborn, and Messrs. Hall & Marshall appearing as attorneys for said William A. Stephens, and said other defendants, although duly served with process, coming not, but making default, and this cause having this day been brought on to be heard upon the complaint filed therein, taken as confessed by the said Defendants Allen Stephens & Co., Herman Blennerhassett, B. F. Allen, Hugh Sherman, as assignee in bankruptcy of B. F. Allen, bankrupt, and Warren Hussey (whose defaults for not answering thereto

257 have been duly entered,) and upon the answers filed thereto by said other defendants William A. Stephens and Matthew T. Gisborn; and upon due proof of the filing of notice of the pendency of this action, containing the names of the parties to the object of the action, and a description of the property affected thereby upon the 22d day of September, A.D. 1883, in the office of the County Recorder of the County of Tooele, in the Territory of Utah, where said property and mining claim set out and described in said complaints is situated, and recording the same in said recorder's office, and the Court having heard the proofs of the respective parties appearing as aforesaid, and having considered the same, and the records and papers in the cause

258 and the arguments of the respective attorneys thereon, and the cause having been submitted to the Court for its decision, and findings of fact and conclusions of law, and the decision thereon in writing having been duly rendered by the Court, which are now on file in this cause, wherein judgment and decree was awarded in favor of the Charter Oak Life Insurance Company of Hartford, Connecticut,—a corporate body—plaintiffs, against all of said defendants, and for costs, on motion of Marshall & Royle, attorneys for Plaintiff:

It is now, therefore, hereby ordered, adjudged, and decreed, that all and singular the said mining claim and premises mentioned in said complaint (except the part thereof which is east of the centre of the ravine) and hereinafter particularly described, or so much thereof as may be sufficient to raise the amount of
259 $51,796.30, due plaintiff from said Gisborn, and for which plaintiff has a first lien on said premises, and the further amount of $721,649.85, due plaintiff from said Gisborn, and for which said plaintiff has a second lien upon said premises, and interest thereon from this date to the day of sale at the rate of ten per cent. per annum, and costs in this suit, taxed at $197.75, and expense of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction to the highest bidder, between the hours of nine o'clock in the morning and five o'clock in the afternoon, by, or under the direction of the United
260 States Marshal within and for the Territory of Utah, at the Court House of the said County of Tooele, in the Territory of Utah, which is the County where said premises are situated. That the said Marshal give public notice of the time and place of such sale, according to the course and practice of the court and the law relative to sales of real estate under execution; and that the plaintiff, or any of the parties to the suit, may become the purchaser at such sale, and that said Marshal, after the time allowed by law for redemption has expired, execute a deed to the purchaser or the purchasers of the said trust-burthened premises on th said sale.

That the said Marshal, out of the proceeds of said sale, retain his fees, disbursements and commissions on said sale,
261 and pay to the plaintiff or his said attorneys out of said proceeds the said sum of money hereinbefore mentioned as being a lien on said premises, in the order of the priority of said leins as aforesaid, and costs of suit, or so much of these sums in their order as the proceeds of such sale will pay of the same.

That the said defendant, and each of them, and all persons claiming or to claim from or under them or either of them, and all persons having liens subsequent to said trust, and the said encumbrances secured by said trust, by judgment, decree or otherwise upon the premises herein authorized to be sold and which were described in said trust, they, or either of them, their heirs or personal representatives, and all persons having any lien or claim
262 by or under such subsequent judgment, decree or otherwise, and their heirs and personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to the said

filing of said notice of the pendency of this action with the recorder as aforesaid, be, and the same are, forever barred and foreclosed of and from all equity of redemption and claim in, of and to said trust-burthened premises herein ordered to be sold, and every part and parcel thereof, from and after the delivery of said Marshal's deed. And it is further ordered, adjudged and decreed that the purchaser or purchasers of said premises so to be sold as aforesaid at said sale,

263 be let into possession thereof, and that any of the parties to this action who may be in possession of said premises, or of any part thereof, and any person who, since the commencement of this action, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers, or the production of the Marshal's deed for such premises, or any part thereof.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the trust referred to or the complaints

264 filed in this action, are as follows, [except so much thereof as is reserved therefrom at the end of this description,] to-wit:

That certain mining property, commonly known and called the Mono Silver Mine, situate, lying and being in Dry Canyon, in Ophir Mining District, in Tooele County, Utah Territory, more particularly described as follows, to-wit:

Mineral entry No. 105 in the series of this land office at Salt Lake City, Utah, designated by the Surveyor General as lot No. 46, containing 3.67-100 acres of land, more or less, and according to the returns on file in the General Land Office in said City of Salt

265 Lake, described, and correctly described, with magnetic variation at sixteen degrees, thirty minutes east, as follows, to-wit: Beginning at corner No. 1, a post marked No. 1, lot No. 46, thence south eighty-three degrees, thirty minutes east 1,600 feet to corner No. 2, a post marked No. 2, lot No. 46, from which a fir tree seventeen inches in diameter, marked B. T., bears north seventy-one degrees, thirty minutes west at the distance of twenty-one and five-tenths feet; thence from said corner No. 2, north six degrees thirty minutes east 100 feet to corner No. 3, a post marked No. 3, lot No. 46, from which a fir tree seventeen inches in diameter, marked B. T., bears north seventy-six degrees west, at the distance of thirteen feet, and U. S. mineral monument No. 6, a fir tree seventeen inches

266 in diameter, marked U. S. M., No. 6, on the south side, and U. S. mineral monument, No. 6, on a board nailed on the east side, bears north fifty-nine degrees west, at the dis-

tance of 462 feet; thence from said corner No. 3, north eighty-three degrees, thirty minutes, west 1,600 feet to corner No. 4, a post marked No. 4, lot No. 46; thence south six degrees, thirty minutes, west fifty feet to a point from which discovery stake bears north eighty-three degrees, thirty minutes west, at a distance of 800 feet, 100 feet to the place of beginning: A description of which is also found recorded in the Recorder's Office, in said County of Tooele, in book "B. B." of records, on pages 632 to 636, inclusive. Nevertheless, however, reserving and excluding therefrom, all that part thereof "which is situated east of the center of the ravine crossing said premises nearest the eastern boundary thereof, which
267 ravine is further designated and identified as the one in which a living spring rises a short distance above the north boundary of said premises."

This the 20th day of May, A. D. 1886. By the court.

C. S. ZANE,
Judge of said Court.

Attest.

[SEAL.] H. G. McMILLAN, Deputy Clerk.

[ENDORSED.] Title of Court and Cause. Decree.
Filed May 20th, 1886.

J. M. ZANE, Clerk.

By H. G. McMILLAN, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STATEMENT UPON MOTION FOR A NEW TRIAL AND UPON APPEAL.

This cause was called for trial before the Court upon the 13th day of May, 1886, Messrs. Marshall & Royle appearing for plaintiff, and Messrs. Arthur Brown, Lyttleton Price and E. B.
268 Critchlow for Defendant M. T. Gisborn, and W. C. Hall counsel for William A. Stephens, trustee.

Upon the calling of the cause a motion for a continuance of the same was made for the Defendant Matthew T. Gisborn, upon the affidavits of Arthur Brown and M. T. Gisborn, which are hereto annexed and marked exhibits "A" and "B". Said motion was opposed by the counsel for plaintiff, and upon argument of counsel, was submitted and by the Court overruled, to which ruling of the Court counsel for Defendant M. T. Gisborn excepted.

The pleadings having been read to the Court, counsel for Defendant M. T. Gisborn thereupon objected to any evidence being introduced in the case, and to proceeding with the trial of the case at this time, on the ground that the issues in the case were not yet made up, the Defendant Gisborn having had no time to answer the
alleged answer or cross-complaint of Defendant William
269 A. Stephens, trustee, in which the sum of $5,000 was claimed as compensation, the said answer and cross-complaint never having been served upon counsel for Defendant Gisborn, nor called to his attention, which motion was then and there overruled by the Court and exception taken by the counsel for Defendant Gisborn. A motion was then made by Mr. Brown to strike out all of the answer of William A. Stephens, trustee, after the denial, which motion was then and there overruled by the Court, and exception taken by counsel for the Defendant Gisborn. Counsel for plaintiff then introduced the deposition of William A. Stephens taken in the cause, and read the interrogatories and answers therein contained to the court separately. Which interrogatories and answers thereto were objected to by counsel for Defendant Gisborn, and were ruled upon by the Court as hereinafter set forth. The first, second and third interrogatories, and the answers thereto, were read to the Court without objection, as follows:

First Interrogatory.

What is your name, age and place of business, and are you
or are you not the same William A. Stephens mentioned
270 as a defendant in the above entitled action?

To the first interrogatory he says:

My name is William A. Stephens; age 55 years; place of residence, New York City. I am the same William A. Stephens therein mentioned.

Second Interrogatory.

As one of said defendants, have you, or have you not, heretofore received and read a copy of this complaint in said action?

To the second interrogatory, he says:

I have.

Third Interrogatory.

Do you know the parties to said action, or either, or
271 which of them? If you have known them or any of them,
state how long you have known each of them and where. Have you had business relations with any of them? If yea, with which of them?

To the third interrogatory, he says:

I know them all. I have known the Charter Oak Life Insurance Company since about 1869 or 1870, in Hartford and New York. I have known the firm of Allen Stephens & Co. since January, 1872, in New York. I have known Matthew T. Gisborn since about April, 1874, in New York and Utah. I have known Herman Blennerhassett since 1868, in New York. I have known B. F. Allen since about 1868 or 1869, in New York, Des Moines and elsewhere. I have known Warren Hussey since about 1868 or 1869, in New York, Utah, &c. I have known Hoyt Sherman, Assig-
272 nee, since about 1875 or 1876. I have had business relations with all.

The fourth interrogatory was then read to the court, as follows:

Fourth Interrogatory.

A copy of said complaint in said action is hereto attached, to which your attention may be called in these interrogatories, and we now ask you to examine certain exhibits in said complaint, to-wit: A copy of declaration of trust, marked "Exhibit D," also copies of two certain deeds marked respectively, "Exhibit B" and "Exhibit C," and would further ask you if you know the parties to said several instruments, and the property mentioned therein, and the said trust mentioned in said "Exhibit D?" If yea, state who were the parties thereto on the face of the papers, and if you acted as trustee for any other person or persons in advancing the said
273 money to said Gisborn mentioned in said declaration of trust, state who you were acting as trustee for, and who furnished you as trustee the money, which you as trustee advanced to said Gisborn?

To which interrogatory objection was made by Arthur Brown, as follows: "I object to that part of the fourth interrogatory in which it is inquired who the witness was acting for as trustee and who furnished him as trustee the money, for the reason that it is an attempt to add to the written trust, which speaks for itself. No ambiguity is exposed or shown in the written trust, and parol testimony can not be introduced to affect its character." Which objection was overruled by the Court and exception taken by counsel for Defendant Gisborn. The answer to the fourth interrogatory was then read as follows:

To the fourth interrogatory, he says:

"I have examined said exhibits D., B. and C. I know
274 the parties to said instruments and the property therein mentioned and the trust mentioned in Exhibit D. The

parties thereto on the face of the paper are Matthew T. Gisborn and myself. I acted as trustee for Allen Stephens & Co., in advancing said money to said Gisborn mentioned in said declaration of trust. They furnished me the money so advanced."

To which answer objection was made by counsel for Defendant Gisborn upon the same grounds as above stated to the interrogatory, which objection was overruled and exception taken thereto. This objection and all others made to answer, in this deposition were made before the answer was received in evidence.

The fifth interrogatory and answer thereto were then read without objection, as follows:

Fifth Interrogatory.

In the year 1874, were you engaged in business in the City of New York, in the State of New York? If yea, state
275 further in what business, and if in connection with other persons, in connection with whom?

To the fifth interrogatory, he says:

In the year 1874, I was engaged in the banking business in the City of New York, in connection with B. F. Allen and Herman Blennerhassett.

The sixth interrogatory was then read as follows:

In the year 1874, were you acquainted with a firm in New York City doing business under the name of Allen,
276 Stephens & Co., and did you know the names of the members of said firm, and how long said firm did business, and whether or not said firm did business as co-partners? If yea, please state the names of the members of said firm; how long said firm did business, and how they did business together, whether as co-partners or otherwise?

To which interrogatory objection was made thereto by Mr. Brown, upon the ground that the same was immaterial and irrelevant. Which objection was overruled by the Court and exception taken by counsel for Defendant Gisborn. The answer to the sixth interrogatory was then read, as follows:

To the sixth interrogatory he says:

In the year 1874, I was acquainted with the firm of Allen, Stephens & Co. The members of that firm were B. F. Allen, William A. Stephens (myself) and Herman Blennerhassett, who did business together as co-partners from January 1st, 1872, to February 13th, 1875.

The seventh interrogatory was then read to the Court, as follows:

277 Seventh Interrogatory.

In said declaration of trust, a copy of which is marked "Exhibit D," as aforesaid, provision is made for the payment to you as trustee, of the sum of $400,000, advanced by you as trustee &c., in these words, to wit: "2nd, to the payment to me as trustee of the sum of four hundred thousand dollars, ($400,000,) advanced by me as trustee to said Gisborn, for the purchase of two-third undivided of said premises from his late co-tenants," &c. &c. And we now ask you for whom, if for any person or persons you acted as agent or trustee in advancing said money to said Gisborn? Whose money was it that was so advanced to said Gisborn?

278 Did you have authority as agent or trustee to advance said money to said Gisborn? If yea, from whom did you have such authority, and what were you empowered to do? And what did you do?

To which interrogatory objection was made by Mr. Brown as follows: "I object to the seventh interrogatory, that it is immaterial whose money was advanced, and that the witness cannot testify for the reason stated in the objection to the fourth interrogatory above, for whom he was agent or trustee in advancing the money. The writing speaks for itself, and the other inquiries involved in this interrogatory are immaterial. I also object on the ground that the evidence is incompetent, as attempting to prove an agency by the agent himself, and also as asking for the conclusion of the witness as to his authority; no facts are asked for."

Which objection was then and there overruled by the Court and exception taken. The answer to the seventh interrogatory was then read as follows:

To the seventh interrogatory, he says:

279 "I acted as trustee for Allen, Stephens & Co. I had authority as trustee to advance said money to said Gisborn from each individual member of said firm. I was empowered by them to advance it on the security of the "Mono" Mine, and I did so, to the amount of $400,000, as set forth in my declaration of trust May 30, 1874. It was the money of Allen, Stephens & Co.

The eighth interrogatory was then read to the Court, as follows:

Eight interrogatory.

"Did you as trustee, receive from Gisborn any, and if any what evidence of such indebtedness of said Gisborn for said $400,-

000.00, or for any part thereof? And what papers passed between you?

To which interrogatory objection was made by coun-
280 sel for defendant Gisborn on the ground that there is no evidence of any loan or indebtedness of $400,000.00. Which objection was then and there overruled by the Court and exception taken.

The answer to the eighth interrogatory was then read to the court as follows:

"As trustee, I received from Gisborn four promissory notes made by Warren Hussey and Matthew T. Gisborn jointly, each dated April 30th, 1874, each for $25,000, and each in my favor as trustee, marked as Exhibits No. 1, 2, 3, and 4, as evidence for $100,000. The papers that passed between us were the above mentioned notes and Gisborn's deed to me as trustee of ten eighteenths of the Mono Silver Mine, dated April 30th, 1874, marked Exhibit B. Also Gisborn's deed to me as trustee of eight-
281 eighteenths of the Mono Silver Mine, dated May 6th, 1874, marked Exhibit C. Also my declaration of trust to Gisborn dated May 30th, 1874, marked Exhibit D, which, in addition of evidencing the above named notes for $100,000, evidenced the balance of the loan of $400,000, viz.: $300,000.

The ninth interrogatory was then read to the Court as follows:

"Look at and examine the four certain promissory notes hereto attached and marked severally "Ehibit 1," "Exhibit 2," "Exhibit 3" and Exhibit 4," each of said notes being for $25,000.00, and state if you know, whose signatures are attached thereto? Who is the payee therein? For what said notes were given? To whom said notes were delivered? Whether said notes were ever endorsed or transferred to any person? If yea, by whom? To whom, and for what purpose? And if you know, state what authority, if any, the payee in said notes had to transfer said notes?"

To which interrogatory objection was made by counsel for Defendant Gisborn as follows: "We object to the ninth interrogatory for the reason that it is immaterial to whom, or by whom,
282 or for what purpose the promissory notes therein referred to were endorsed, or the authority that the witness had to endorse, them. If the promissory notes don't speak for themselves as to the authority which he had from the maker thereof to endorse no other authority can be added to that." Which exception was then and there overruled by the Court and exception taken

thereto. The answer to the ninth interrogatory was then read to the court as follows :

To the ninth interrogatory he says :

"I have examined the four promissory notes, marked Exhibits 1, 2, 3, and 4, for $25,000 each. The signatures attached to each note are known to me. They are those of Warren Hussey
283 and Matthew T. Gisborn. I am the payee thereof, as trustee. Said notes were given for the first $100,000 of the total $400,000 advanced by me as shown in my declaration of trust to Gisborn of May 30th, 1874, marked herewith as Exhibit D. They were delivered to me as trustee and by me transferred to my principals, Allen, Stephens & Co., at once. As their trustee and partner I had the authority to transfer the notes to my principals, Allen, Stephens & Co.

Counsel for plaintiff then offered in evidence the four promissory notes attached to the deposition and referred to in the ninth interrogatory, which read as follows :

"$25,000. NEW YORK, April 30th, 1874.

Two months after date we jointly and severally promise to pay to the order of Wm. A. Stephens, Esq., trustee, twenty-five thousand dollars. Payable at Allen, Stephens & Co.'s
284 office, New York, value received. With seven per cent., interest."

WARREN HUSSEY.
M. T. GISBORN.

Endorsed : Wm. A. Stephens, trustee."

"$25,000. NEW YORK, April 30th, 1874.

Four months after date we jointly and severally promise to pay to the order of Wm. A. Stephens, Esq., trustee, twenty-five thousand dollars. Payable at office of Allen, Stephens & Co. Value received, with seven per cent. interest.

WARREN HUSSEY.
M. T. GISBORN.

Endorsed: Wm. A. Stephens, trustee."

"$25,000.00. NEW YORK, April 30th, 1874.

Three months after date we jointly and severally promise to pay to the order of Wm. A. Stephens, Esq., trustee,
285 twenty-five thousand dollars. Payable at the office of Allen, Stephens & Co. Value received with seven per cent. interest.

WARREN HUSSEY.
M. T. GISBORN.

Endorsed : Wm. A. Stephens, trustee."

"$25,000.00. NEW YORK, April 30th, 1874.

Two months after date we jointly and severally promise to pay to the order of Wm. A. Stephens, Esq., trustee, twenty-five thousand dollars. Payable at the office of Allen, Stephens & Co. Value received with seven per cent. interest.

WARREN HUSSEY.
M. T. GISBORN.

Endorsed: Wm. A. Stephens, trustee."

To which notes objection was then made by counsel for Defendant Gisborn as follows: "We object to the introduction of those notes, first on the ground that they are barred by the statute of limitations of the Territory of Utah, and second on the ground that they and each of them appear to have been mutilated since execution by adding the word "trustee" to the name of William A. Stephens. Which objections and each of them were then and there overruled by the court and counsel for Defendant Gisborn excepted to the said ruling, and the notes were there upon received in evidence.

The tenth interrogatory was then read to the court as follows:

Tenth Interrogatory.

"As to the residue of said indebtedness of $400,000, outside of said promissory notes, to-wit: As to the $300,000 who, if any owed said trustee, and was to pay said trustee that sum of money?"

Which said interrogatory was objected to by counsel for Defendant Gisborn, for the reason that it was an attempt to ask the witness to construe the effect of a written declaration of trust, which only the Court can do; that if the declaration does not itself state who owned the money and who was to pay it, the witness cannot by so stating, create the indebtedness. Which objection was then and there overruled by the Court, and exception was taken thereto by counsel for Defendant Gisborn. Thereupon the answer to the tenth interrogatory was read to the Court as follows:

To the tenth interrogatory he says:

"Matthew T. Gisborn and Warren Hussey."

The eleventh interrogatory was then read to the Court as follows:

Eleventh Interrogatory.

"Look at this paper marked "Exhibit 5," which is attached to these interrogatories, and state if you know, and what means you have of knowing, who executed, and the signature attached, said paper marked "Exhibit 5?"

To which interrogatory objection was made by Mr. Brown that the same was immaterial and irrelevant. Which objection was overruled by the Court, and exception taken to said ruling, and the answer to the eleventh interrogatory was then read to the Court as follows:

To the eleventh interrogatary he says:

"I have looked at the paper marked 'Exhibit 5,' and know that the firm of Allen, Stephens & Co., executed the signature attached to said paper; my means of knowing it are that I was a
289 member of that firm at that time, and know of, and assented to its execution."

"Exhibit 5," to the deposition was then offered by counsel for plaintiff, which is an assignment, purporting to be made by Allen, Stephens & Co., to the Charter Oak Life Insurance Company, and which reads as follows:

"Know all men by these presents, that we, Allen, Stephens & Co., of the City of New York, of the first part, for and in consideration of the sum of one dollar, to us in hand paid by the Charter Oak Life Insurance Company of Hartford Connecticut, of the second part, and for other good and valuable consideration, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said party of the second part and to its assigns, all claims and demands which the said parties of the first part have against Matthew T. Gisborn and Warren Hussey, jointly or indi-
290 vidually for moneys heretofore loaned or advanced to William A. Stephens, trustee, for their joint or individual account, by said parties of the first part, together with all promissory notes, made by the said Matthew T. Gisborn and Warren Hussey, to the said William A. Stephens, trustee, to secure portions of the said indebtedness. To have and to hold the same unto the said party of the second part, and its assigns for its and their own use.

In witness whereof the said parties of the first part, have hereunto signed their firm name the twelfth day of February, 1875.

ALLEN, STEPHENS & CO.

In presence of Jos. Jay Phillips."

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } ss.

"On this 12th day of February, in the year One Thousand

Eight Hundred and Seventy-five, before me, personally
291 came Herman Blennerhassett, to me known and known to me, to be a member of the firm of Allen, Stephens & Company whose names are affixed to the foregoing instrument as parties thereto and acknowledged that he executed the said instrument as the act and deed of the said firm of Allen, Stephens & Co., for the purpose therein mentioned.

JOS. JAY PHILLIPS,
292 Commissioner of Deeds,
New York City."

To which counsel for defendant Gisborn, objected to on the ground that the firm of Allen, Stephens & Co., had no power to assign the trust, or to transfer the execution of the trust to any other party, which objection was then and there overruled by the court, and exception taken thereto.

The twelfth interrogatory was then read to the Court as follows:

Twelfth Interrogatory.

"Do you know which member of the firm of Allen, Stephens & Co., signed the firm name to said 'Exhibit 5,' if yea, state who? And if you know state further whether or not, the acknowledgements attached to said 'Exhibit 5,' state the truth?"

And the answer thereto as follows:

To the twelfth interrogatory he says:

"Herman Blennerhassett signed the firm name to 'Exhibit 5,' and the acknowledgement attached thereto states the truth."

Counsel for Defendant Gisborn, thereupon objected to that part of the above answer which stated "the acknowledgement
293 attached thereto states the truth," on the ground that plaintiff can not by parol testimony, add to or change the proof of acknowledgement attached to a written instrument, which objection was then and there overruled by the Court and exception taken.

The thirteenth interrogatory was then read to the Court as follows:

Thirteenth Interrogatory.

"Do you know, and if you do state, whether or not, the execution of said 'Exhibit 5,' was directed and authorized by said firm of Allen, Stephens & Co. To whom if any one, was said 'Exhibit 5,'

delivered? What 'claim,' 'demand' and 'moneys' are referred to, where these words are used in said 'Exhibit 5?' "

To which interrogatory, counsel for Defendant Gisborn objected,
for the reason that it was an attempt to prove, by parol
294 testimony, some other thing than that which is mentioned in the paper itself; as being immaterial, and as seeking to vary or contradict the terms of a written instrument, and also as calling for a conclusion of law from the witness." Which objections and each of them, were then and there overruled by the Court, and exception taken thereto by counsel for Defendant Gisborn.

The answer to the thirteenth interrogatory was then read to the Court as follows:

To the thirteenth interrogatory he says:

"The said 'Exhibit 5' was directed and authorized by Allen, Stephens & Co., and was delivered to the Charter Oak Life Insurance Company. The 'claims,' 'demands' and 'moneys' referred to therein, are those arising from the $400,000 advanced on the 'Mono Mine,' as set forth in my declaration of trust, marked 'Exhibit D.' herewith."

The fourteenth interrogatory and answer thereto were
295 then read to the Court, as follows:

"In advancing as trustee to said Gisborn said sum of $400,000, besides the four promissory notes aforesaid were there any other papers passed between you and said Gisborn? If yea, state what they were?"

To the fourteenth interrogatory he says:

"Yes. The two deeds marked as Exhibits B & C and the declaration of trust marked Exhibit D." The two deeds and the declaration of trust above referred to are those marked Exhibits "B" and "C" and "D," and attached to the original complaint in this action.

The fifteenth interrogatory and the answer thereto were withdrawn and were not at that time read to the Court.

The sixteenth interrogatory and answer thereto were then read to the Court, as follows:

Sixteenth Interrogatory.

"After the execution of said declaration of trust what
296 action if any did you as trustee take in regard to said Mono Mining Claim?" Was this ground in possession of any one, if so, of whom? Was the ground worked by you as

trustee, or by you as trustee in conjunction with any one else? If yea, state fully who worked the same? How long was it worked, what was the result of such working?"

"Did you whilst working said mine, or did you not exclude said Gisborn from any part or participation in said mine? Or from any part, participation or control of said mine, which he was entitled to under or by reason of said declaration of trust?"

To the sixteenth interrogatory he says:

"As trustee I simply saw that the Mono Mining Claim was placed in the management and control of Samuel K. Hobman and A. W. Adams, the two persons named in the declaration
297 of trust, and set to work by those parties as the representatives of Mr. Gisborn and myself under the terms of said trust. At that time the ground was in actual possession of a Col. William F. Robinson who had been acting as superintendent for its former owners including Mr. Gisborn and his partners, and who remained and continued its superintendent of mining, under the employment of the before named managers of the trust, Hobman and Adams, until sometime in the later summer or autumn of 1874, until after the mining ceased to be profitable. The ground was not worked by me personally as trustee, only as above stated, by the representatives of Mr. Gisborn and myself as trustees, with Robinson as mining superintendent. It was so worked from about June 1st, 1874, at a profit, until about July or
298 August, 1874, when it ceased to yield ore in quantities sufficient to pay expenses of working. While the mine was worked as I have before stated neither I or my representatives ever excluded Mr. Gisborn from any part or participation or control of said mine which he was entitled to under or by reason of said declaration of trust. Neither then, not at that time, or at any other time that I have any knowledge of. In fact, since the mine ceased to pay in 1874 Mr. Gisborn or his representatives have generally been and practically were solely in charge of the property excepting when it was under lease to others by our mutual consent."

The seventeenth interrogatory was then read to the Court as follows:

Seventeenth Interrogatory.

"After you commenced, as trustee, work on said mine, did you consult anyone as to the work to be done, and the expenses to be incurred in working said mine? If yea, who did you consult?"

Did said Gisborn have knowledge of such work and

299 expenses, when the same were being done and incurred? If yea, state how he was informed? and what took place between you in regard to said work and expenses? and whether said Gisborn approved or disapproved of the work done and expenses incurred?"

And the answer thereto as follows:

To the seventeenth interrogatory he says:

Gisborn was always consulted about the work to be done and the expenses to be incurred in working said mine; and while I often conferred with others having a practical knowledge of the subject of mining for my own information on which to form a judgment, Gisborn was always consulted and had full knowledge of
300 all work done and expenses incurred, often doing work and incurring expense on his own judgment. He was informed through his and my representatives in trust, Hofman and Adams, and by his personal presence, during all the work done and expenses incurred in 1874. The mine and their books were always open to him; in all expenses incurred in defending the title to "Magnolia" suit in 1876 he was present in consultation with his own counsel, Messrs. Rosborough & Merritt, with our counsel Messrs. Marshall & Royle and J. W. Simpson, with Mr. Holman, my representatives and Mr. Hussey, who were then present. He had full, accurate knowledge of all going on at that time, and not only approved of it, but heartily aided *them all in his power* at the mine and elsewhere. He was in charge of repairs at this time and doing some prospecting there about that time, as manager for the trustee, doing the work and spending the money on his own judgment, which, of course, he approved of; during my presence
301 in Utah in 1877, and at all other times when there, I consulted with him and informed him in person of all that was done and proposed to be done. While in Salt Lake on the 21st of April, I addressed to Mr. Gisborn a letter on the subject of expenses, over and above receipts incurred by him as manager for the trustee, between February 1st, 1876 and April 1st, 1877, a true copy of which letter I annex to my answers to interrogatories under this commission marked "Exhibit 1. E. J. N." I also annexed thereto a true copy of Gisborn's reply to that letter, marked "Exhibit 2. E. J. N." I was always most particular in advising him and obtaining his approval of all that was done or proposed to be done by me as trustee, and nothing was done without his approval. In the month of July, 1879, I received a letter from Mr.
302 Gisborn dated July 14th, 1879, a copy whereof is annexed

hereto marked "Exhibit 5. E. J. N." We were always in harmony in all work done and expenses incurred. I am unable to call to mind a single objection made by him to either. I do not think there was one, excepting perhaps that I was unable to raise, as trustee, all the money he thought ought to be spent in prospecting for the lost vein. Even in that we were in harmony."

Which answer was objected to upon the ground that it was not responsive to the question. Which objection was then and there overruled by the Court, and counsel for Defendant Gisborn excepted to said ruling.

Counsel for plaintiff then offered in evidence a letter of Stephens and Gisborn, dated April 21st, 1877, attached to said deposition and referred to in the last answer and marked "Exhibit 1, E. J. N." which reads as follows:

"SALT LAKE CITY, April 21st, 1877.

M. T. GISBORN, ESQ., Salt Lake City.

Dear Sir:

I find that of the indebtedness incurred by you under your management of the "Mono" Mine between February 1st,
303 1876, and April 1st, 1877, the sum outstanding and unpaid on the latter date to be between $7,000 and $8,000, as audited and approved by you as correct. I have no funds in my hands as trustee to meet the same, nor can I borrow any for that purpose. I have applied to the Charter Oak Life Insurance Company, who hold the original loan on the property by assignment, from Allen, Stephens & Co., but they do not respond, having already advanced me as trustee some $22,000 or $23,000 for the purchase of the two judgments against me as trustee, and yourself and for defending the suit of Magnolia vs. Mono in spring of 1876. As the next party in interest I apply to you to know if you can and will furnish the means to pay off the above named claims?
304 This I would advise you to do if you can. Should you be unable to do it the next best thing that occurs to me is to see if I can make some arrangement with some party to take up these claims (and possibly those incurred in April, 1877, which we estimate will be about $2,000) and concentrate the whole of them in the hands of one party and thus, should we be pressed, diminish the expense and at the same time protect our laboring men and employees from loss, delay and costs and the mine from the bad odor of innumerable small suits. As you are one of the parties in interest in this trust which I hold, I have felt it my duty no less than my

privelege to consult you freely in this matter and request as I now do, your advice in the premises.

Very Truly Yours,

WILLIAM A. STEPHENS, Trustee."

Counsel for plaintiff also offered in evidence a letter from Gisborn to Stephens dated April 21st, 1877, attached to said
305 deposition and referred to in said last named answer and marked "Exhibit 2, E. J. N.," and which reads as follows:

"G. S. ERB. B. S. GRIFFIN.

THE LEADING HOTEL OF UTAH,
WALKER HOUSE.
Erb & Griffin, Proprietors.
Main Street.

SALT LAKE CITY, Utah, April 21st, 1877.

WILLIAM A. STEPHENS, ESQ., Trustee, Mono Mine.

Dear Sir:

I have received your letter of April 21st, 1877, and have carefully considered its contents. I regret I am not in a condition pecuniarily to pay off or in anywise satisfy the claims
306 against you as trustee referred to in your letter. These claims are just and should be paid and as the other parties in interest have not responded, and as I see no better way to arrange them than that suggested by you in your letter, I most heartily endorse the plan proposed by you, and as far as my interest is concerned I authorize you to so arrange these claims.

Yours Very Truly,

M. T. GISBORN."

And also a letter from Gisborn to Stephens dated July 14th, 1879, which reads as follows:

"SALT LAKE CITY, UTAH, July 14th, 1879."

WM. A. STEPHENS, Esq., Brevoort House, New York City, New York. Trustee of the Mono mining property in Tooele County, Utah.

Dear Sir:

Messrs. Marshall & Royle have called my attention to your letter of June 30th, 1879, in which you advise me
307 to state my opinion of the work done on the mine by Marshall, Royle & Clark. In response I would say, that shortly before they ceased working I visited and examined the

mine and the work done, and up to that date it was satisfactory to to me, and I considered the work done by Marshall, Royle & Clark good and workmanlike, as good as I would have done if I had been working it myself. I have no doubt that the small residue of work done since my examination was equally well done. It was satisfactory to me.

MAT. T. GISBORN."

"Exhibit 5." "E. J. N."

Which letters and each of them were objected to by counsel for Defendant Gisborn, on the ground that the same were immaterial and irrelevant. Which objections and each of them were overruled by the Court and exception taken to such ruling.

The eighteenth interrogatory was then read to Court as follows:

Eighteenth Interrogatory.

"Has the working of said mine since you have been
308 trustee been profitable or unprofitable?"

Which interrogatory was objected to by counsel for Defendant Gisborn, on the ground that the same was immaterial and irrevelant; objection overruled and exception taken thereto. Whereupon the answer to said interrogatory was read as follows:

To the eighteenth interrogatory he says:

"Decidedly unprofitable since about July, 1874."

The nineteenth interrogatory was then read to the Court as follows:

Nineteenth Interrogatory.

"If you answered the last interrogatory that the working of said mine has been unprofitable, please state further, why the work was unprofitable, and what efforts if any, you made as trustee to render such working profitable?"

To which interrogatory objection was made that the same was immaterial and irrelevant, which objection being overruled by the
Court, exception was taken by counsel for Defendant Gis-
309 born. Whereupon the answer to said interrogatory was read to the Court as follows:

To the nineteenth interrogatory he says:

"It was unprofitable because it ceased to yield ore in sufficient quantities after the first few weeks to even pay expenses, by reason, as I am informed and as I believe, of a "fault" or "break" in the vein. I made every effort, as trustee, to have this "fault" discovered, so as to render such working profitable, and continued those

efforts whenever I could induce the Charter Oak Company, or anybody to furnish the money, even down to my fourth visit to Utah in November, 1877. Completing my efforts then by leasing the mine during that visit, when I could get no more money from any source, in the hope that the lessees might succeed in
310 finding the "fault" or even find some other body of ore during their lease. I will add that I have never relaxed my efforts to do all in my power to carry out the conditions of the declaration of trust from the first day I undertook it. My efforts were also directed to saving the property from sale under judgment; in defending its title when attacked; and in every other way in my power to save the property and try to make it pay."

The twentieth interrogatory together with the answer thereto were then read to the Court as follows :

Twentieth Interrogatory.

"In these efforts of yours did you not advise and con-
311 sult with said Gisborn, as to what should be done, and did he or did he not approve of what you did in that regard?"

To the twentieth interrogatory he says :

"In all these efforts I advised and consulted with Gisborn as to what should be done and all that was done was done with his approval."

To which interrogatory and answer counsel for Defendant Gisborn objected on the ground that the same were indefinite and unconclusive ; too general to aid the Court in any manner. Which objection was overruled by the Court and exception taken thereto by counsel for Defendant Gisborn.

The twenty-first interrogatory was then read to the Court, as follows:

Twenty-First Interrogatory.

"If, in executing said trust, you found you were not making money, but on the contrary that you were losing money and incurring indebtedness, why did you continue the work and incur indebtedness?"

Which interrogatory was objected to by counsel for
312 Defendant Gisborn as immaterial and incompetent; the cause and motives leading the witness to act are immaterial. Which objection was overruled by the Court and exception taken thereto by counsel for Defendant Gisborn. Whereupon the answer to the twenty-first interrogatory was then read to the Court as follows:

To the twenty-first interrogatory he says:

"I continued the work and incurred the indebtedness to save the property, and in the hope that the "break" in the vein might be discovered and the mine again rendered profitable to all concerned in the trust."

The twenty-second interrogatory was then read to the Court as follows:

Twenty-Second Interrogatory.

"Do you know the amount of the indebtedness, which,
313 as trustee, you incurred in attempting to execute said trust? If yea, please state the same."

And the answer to the twenty-second interrogatory, upon objection by counsel for Defendant Gisborn was striken out and excluded.

The twenty-third interrogatory was then read to the Court as follows:

Twenty-Third Interrogatory.

"Why did you, personally, as trustee, stop working said mine?"

Which was objected to by counsel for Defendant Gisborn, upon the grounds stated in the objection to the twenty-first interrogatory. Which objection was then and there overruled by the Court and exception taken.

The answer to this interrogatory was then read to the Court as follows:

To the twenty-third interrogatory he says:

314 "Because I had neither the funds at my command, as trustee, nor could I raise them outside, mainly because of the heavy indebtedness against the property."

The twenty-fourth interrogatory was then read to the court as follows:

Twenty-Fourth Interrogatory.

"In executing said trust, have you received any money which you could properly or rightfully pay or credit upon any of the indebtedness provided to be paid under the terms of said declaration of trust? If yea, when and how much?"

Which interrogatory was objected to by counsel for Defendant Gisborn, upon the ground that the inquiry assumed the existence of an indebtedness which had not been proven. Which objection was
315 overruled by the Court, and exception taken by counsel for Defendant Gisborn.

The answer to this inquiry was then read to the Court as follows:

To the twenty-fourth interrogatory he says:

"The funds which were remitted to me as trustee, by Hobman & Adams, to New York, during the month of July in 1874, while the mine was paying, I regard as properly a credit upon the original indebtedness under the terms of the trust, less such disbursements and expenses made by me as trustee, and advanced by Allen, Stephens & Co. The total amount received between July 2nd, and 14th, by Allen, Stephens & Co., through me as trustee, was $20,000.00

On July 25th, 1874, I paid counsel fee [retainer to Britton, Grey & Drummond, Washington, patent suit:] $2,500.00

Sundry other expenses, advanced by A. S. & Co., ... $4,510.66 $7,010.66

Leaving a balance to Allen Stephens & Co., of $12,989.34

316 which I paid to Allen, Stephens & Co., on account of their loan to Gisborn, and it is a proper credit to be made by me as trustee, on such indebtedness."

The twenty-fifth interrogatory was then read to the Court as follows.

Twenty-fifth Interrogatory.

"The witness will please examine the copy of the complaint hereto attached, commencing on page thirteen of said copy, where a judgmunt is mentioned as having been rendered in favor of Britton, Grey & Drummond, under a heading of 'first' and continuing on through said copy of complaint, through the different headings of 'second,' 'third,' 'fourth,' 'fifth,' 'sixth,' 'seventh,' 'eighth,' 'ninth,' 'tenth,' 'eleventh,' 'twelfth,' 'thirteenth' and 'fourteenth,' and ending at the top of page twenty-four of said copy; and having so examined, please state, what if anything, these several items of indebtedness, claims or demands, had to do with your execution of said trust? Did they, or either of them, in any way affect said trust, if yea, in what manner? Was said Gisborn, at the time said debts and claims originated, advised of the existence thereof, and

317 did he advise and consult with you, as to the same, or any part thereof? If yea, please state the facts in relation thereto, and state fully what, if anything was agreed upon, or consented to between you and said Gisborn in relation thereto."

And the answer thereto was then read to the Court, where-

upon it was objected to by counsel for Defendant Gisborn. "That said answer was immaterial and incompetent; first, because the trustee had no power to incur any indebtedness and to charge it upon the property; and secondly, that the answer was heresay."

Thereupon said objection was in part allowed by the Court,
318 and the answer as admitted reads as follows: And to the refusal of the Court to sustain the objection in full and to suppress the whole of said answer, counsel for Defendant Gisborn, then and there excepted.

To the twenty-fifth interrogatory he says.

I have examined them. They all had to do with and affected my execution of said trust, viz. : In defending the tittle to the property (saving its being sold under judgment) besides keeping the property in repair and by furnishing labor, supplies, material and expenses in aiding the efforts made to find the "break" in the vein, &c., and to otherwise render the mine profitable to work. Gisborn
was always advised when said debts and claims orignated
319 and of their existence. And particularly advised as to the existence of those claims marked in this complaint as Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, which were debts incurred at a time when he was manager for the trustee. About $7,500 of which were incurred by him without consulting with me or without any knowledge or consent at the time, and not known to me until about the time I arrived in Utah in February, 1877. The balance being incurred after that date on consultation between Gisborn and myself."

The twenty-sixth interrogatory was then read to the Court as follows :

Twenty-sixth Interrogatory.

"Did you as trustee ever lease said mine? If yea, state why you quit work yourself and leased the same? Whether said Gisborn had any connection with said lease or lessees, if so, what connection."

Which interrogatory was then and there objected to as immaterial and irrelevant. Which objection was overruled and
320 exception taken thereto. The answer to this interrogatory was then read to the Court as follows :

To the twenty-sixth interrogatory, says :

"As trustee I did lease the mine in 1878 and renewed same the following year. I quit work and leased it because I had no funds in the trust with which to work it and could not raise any. I hoped

by leasing it that the lessee might at least succeed in finding the "fault" in the vein. In fact it seemed to be all there was left to do in my efforts to save the property and make it pay. I personally consulted Mr. Gisborn who assented to leasing and even to the terms of a lease then proposed to be taken by responsible and satisfactory parties, Messrs. Marshall Royle & Clark, though he withheld his formal approval because he first wanted an interest in the lease himself, which I could not consent to, and then a lease to parties who were not known, &c., or not satisfactory to me, and whom I knew would not be accepted by the Charter Oak
321 Company, whose consent I also required to any lease made Gisborn's consent to leasing to Marshall, Royle and Clark was so long withheld that I left Salt Lake for New York on January 14th, 1878, and his final approval was not given until after I had got home. Finally his written approval was obtained to that lease and to its renewal the following year."

The twenty-seventh interrogatory was then read to the Court as follows:

Twenty-seventh interrogatory.

"About what time did active work in mining cease in said mine, and why did it cease?"

And the answer thereto, upon objection by counsel
322 for Defendant Gisborn, was in part stricken out, and as admitted reads as follows:

To the twenty-seventh interrogatory he says:

"It ceased being actively worked as a paying mine in autumn, about, 1874, when the mine was closed. And after, and until about the later winter, or early spring of 1876, the mine remained idle, both for want of funds and of litigation with the "Magnolia" mine. In March about, of that year (1876) work of retimbering the mine and prospecting for the lost vein, and working over some of the old workings was begun under Gisborn's management as manager for the trustee with the understanding that he should not incur any debts beyond the money then furnished him by the
323 trustee, through the Charter Oak Life Insurance Co., and his receipts from sales of ore taken out. This work continued until the spring of 1877, Gisborn incurring debts contrary to understanding, to the amount of some $7,500, which debts being provided for by the Charter Oak Company, the future work provided for by them to such an extent as they might elect, the active work of prospecting, &c., under same management continued until

ordered by the Charter Oak Company to be stopped, on the 1st of November, 1877; active work then ceased. It ceased with me as trustee, because I had no funds in the trust with which to prosecute it, and could not raise any on the mine as trustee for the further work of exploring for the lost vein or ore body, the Charter Oak Company's management declining to furnish any more funds. Since that time I have not been able to do any further work for want of funds, under my trust, beyond what was done in leasing the mine between January 1st, 1878, and June 10th, 1879."

To which answer as admitted counsel for defendant
324 Gisborn objected, that the same was immaterial, irrelevant and argumentive. Which objection was then and there overruled by the Court, and exception taken thereto.

The twenty-eighth interrogatory was then read to the court as follows :

Twenty-Eighth Interrogatory.

"In December A.D. 1876, on or about January 1st, 1877, or, at any other time or date since you became trustee, did you, or did you not forsake or abandon said mine, or your rights or interests therein as trustee, or your said trust, or your rights and duties in the premises as trustee?"

Which interrogatory was objected to by counsel for Defendant
Gisborn, for the reason that it calls for a conclusion of the
325 witness and not for any fact. Which objection was overruled by the Court, and the answer to said interrogatory was then read to the Court as follows:

To the twenty-eighth interrogatory he says:

"Neither in December, 1876, or on or about January 1st, 1877, or at any other time or date since I became trustee, have I ever forsaken or abandoned said mine, or any right or interest therein as trustee, or my said trust, or my rights or duties in the premises as trustee."

The twenty-ninth interrogatory was then read to the Court as follows :

Twenty-ninth Interrogatory.

"Please state the facts and circumstances under which you became trustee in this matter? When was the matter first brought to your attention, and who by, and under what circumstances connected therewith, did you consent to act as trustee therein?"

MR. BROWN: I object to the twenty-ninth interrogatory for

the reason that the written papers themselves show the
326 circumstances under which the witness became trustee, the authority that he had to act, and the consideration he had for acting, and the witness can not now add to or change them by any parol testimony."

COURT: Let the objection be overruled.

Exception was taken to this ruling, by Mr. Brown.

The answer to the twenty-ninth interrogatory was then read to the Court by Mr. Royle as follows:

To the twenty-ninth interrogatory he says:

"(As to the facts and circumstances under which I became trustee in this matter, they are substantially these: Sometime early in April, 1874, the subject of a loan on the Mono mine to buy out the interest of certain parties therein, was suggested
327 by Warren Hussey on behalf of M. T. Gisborn to my firm Allen, Stephens & Co. Hussey had long been known to Mr. Blennerhassett, and had formerly been cashier of B. F. Allen's bank at Des Moines. He had been well-known to me since about 1869. He was favorably known to all three of us, and we knew from his history that he had had considerable knowledge and experience in mines and mining. His first talk with me was not encouragingly received. He then talked with Mr. Blennerhassett, who again sent him to talk with me about it. I was at home at the time and he brought the message from Blennerhassett, that if I would listen to Hussey's proposition and thought well of it, that he, Blennerhassett, would entertain the proposition, provided, that I would go out to Utah and investigate the property and subject, and provided our other partner, B. F. Allen, approved of the transaction.)"

MR. BROWN: I object to so much of the answer as
328 has just been read, on the ground that the same is hearsay and irrelevant.

The objection was made before the answer was received in evidence.

COURT: Let the objection be overruled.

Exception taken by Mr. Brown.

MR. ROYLE: The answer continues as follows: "Allen lived in Chicago, and it was proposed that Hussey and I should stop there and see him on our way to Utah. Hussey's proposition was that Allen, Stephens & Co., should make the loan of $400,000 to Gisborn on the Mono mine as security, which money would be applied to buying out the interest of Gisborn's partner in the mine.

That he (Hussey) knew all about the mine and its value, and that there would be both safety and profit in the loan, for that he was to receive from Gisborn for making the loan, one-half of the mine after the loan was paid off, which interest he would divide with us.

He furthermore proposed giving his and Gisborn's joint
329 obligation for said loan. $100,000 was required at once, in order to enable them to buy out one particular partner's interest, which had to be paid for at once. We were to advance that $100,000 before leaving New York, which was to be returned to us on demand, if on my arrival in Chicago, my partner, Allen, did not approve of the transaction; and further, if on my arrival in Utah, I concluded not to carry out the matter. Before leaving New York, Hussey took me up to see Gisborn, who was in bed at the Fifth Avenue Hotel ill of pneumonia, as I was told, and could not go out. And in Gisborn's and my presence, stated the terms and agreement talked of between us, to all of which, Gisborn assented; and before we left New York, on May 2d, 1874, for Utah, the $100,000 was paid to Hussey by me as trustee for Allen, Stephens & Co., when I received the four joint promissory notes
330 of $25,000 each, marked herewith, "Exhibits 1, 2, 3 and 4," as evidence thereof, along with Gisborn's deed for over one-half, I think ten-eighteenths of the Mono Mine and Hussey's agreement with Allen, Stephens & Co., to pay them a commission from the four-eighteenths of the mine, which he was then entitled to under his agreement with Gisborn, a copy of which is hereto attached, marked "Exhibit 3, E. J. N." Hussey and I went to Chicago, saw Allen, who consented to the transaction made and promised to be made, then proceeded to Utah, where I investigated the mine and subject, (and finally advanced the remaining $300,000 on May 30th, 1874, on the security of the deed for the entire mine,) taking, as further evidence thereof for the $100,000 and for the balance, the $300,000, the trust."

Mr. BROWN: I object to the latter part of the foregoing, to-wit: "and finally advanced the remaining $300,000 in May, 1874, on the security of the deed for the entire mine," on the ground that the same gives the conclusion of the witness, and is virtually a construction of the deed and the different papers in this case.

COURT: Let the objection be overruled. Exception taken by Mr. Brown.

Mr. Royle continued the reading of the answer as follows:

"Later on Hussey assigned to me Gisborn's agreement with him to give him one half of the mine for negotiating the
331 loan, of which agreement a copy is herewith attached,

where I furnish copies of two letters marked "Exhibit 1" "E. J. N." and "Exhibit 2." "E. J. N."

Second Cross-Interrogatory.

"How many times were you personally in Utah? When, give the exact dates, and how long did you stay each time, and
337 when and where did you see the Defendant Gisborn?"

To the second cross-interrogatory he says:

"Five times. The first I arrived on or about May 9th, 1874, and left on or about June 9th, 1874; the second I arrived on or about August 7th, 1874, and left on or about October 2d, 1874; the third I arrived on or about February 25th, 1877, and left on or about April 30, 1877; the fourth I arrived on or about November 5th, 1877, and left on or about January 1st, 1878; the fifth I arrived on or about January 10th, 1874 and left on or about January 14th 1878. During those visits I saw Gisborn at my hotel, at my lodging house (C. V. Spencer's) at the house of Warren Hussey, at Gisborn's house, at the office of Messrs. Marshall & Royle, at the Mono Mine, on the streets of Salt Lake City and elsewhere. When we were both in Salt Lake City I saw him nearly every day, though after this lapse of time it is impossible for me to give the exact dates of each particular meeting or what transpirid at each particular time."

Third Cross-Interrogatory.

"Did various items which you answer in reference
338 to the twenty-fifth direct interrogatory, come under your personal knowledge, or were they merely reported to you? If they came under your personal knowledge, state with regard to each just what you know in regard to them. If you ordered any of them just state what order you made and what you did with regard to it. If you know of any work or material being furnished for any one of those items, state your knowledge with regard to it. Where did you live during the period of time those articles were being furnished and those items being contracted? Did you order them in person or by another? If by another by whom did you order them—who was your agent?"

To the third cross-interrogatory he says:

339 "The first item came under my personal knowledge. It was part of a fee agreed upon by me as trustee to be paid to Britton, Grey & Drummond, lawyers, for services in adverse claim of I think, the Magnolia Mine and others, and for seeking to have the United States patent to the mines obtained. The original

amount was $2,500, interest, costs &c. made up the amount for which judgment was obtained for $2,630. With relation to the second, the transaction was made by our agents Holman and Adams under the terms of the trust and was reported to me, and has already been explained in my testimony in this case. It did not come under my personal knowledge.

With regard to Nos. 3 to 14 both inclusive. Gisborn was acting as 'manager for trustee' when these items of indebted-
340 ness were incurred, as shown best by their each being "approved" by him in writing on the claims themselves. Items three to eleven, both inclusive, were incurred previous to my visit to Utah, of February, 1877, by Gisborn and were reported to me by him on my arrival. Item twelve, was incurred in part, if not in whole, while I was in Utah between February 25th, 1877, about, and April 30th, 1877, about, and in a measure came under my personal knowledge during that time, but in the main were reported to me by either Gisborn or George Clark and H. E. Barstow; Clark being then the foreman at the mine, and Barstow the book-keeper, under Gisborn as manager for trustee, (both of whom had been appointed by Gisborn long before, as I understood, and both
341 continued in these positions down to the first of November, 1877, when active work in the mine ceased,) I may have incidentally, as trustee, at that time, ordered some of the work and material embraced in that item. The orders given, work done and expenses incurred, were all practicularly done by Gisborn as manager for trustee, as agreed upon by Gisborn and myself. I was simply, while there at that time, doing all I could as trustee, to aid the work then being done, Gisborn being part of the time, absent at Leeds, Utah. I saw some of the work being done, and material furnished at that time, but after this lapse of time am unable to recall the details. Items thirteen and fourteen were mostly,
342 if not all incurred after I left Utah, about April 30th, 1877, and were reported to me by Gisborn, as manager, through accounts furnished me by him, either direct, or through Messrs. Marshall & Royle, whom I appointed as my agents, (under the terms of trust) on the 28th of April, 1877, just before I left Utah. With the exception of the time I was in Utah, as before mentioned, I lived in New York, while those items were being contracted."

Fourth Cross-Interrogatory.

"Where have you lived since the date of the execution of the trust, to-wit: The 30th of May, 1874. Who drew up said declaration of trust? How many times have you been in Utah
343 since the date of said instrument?"

To the fourth cross-interrogatory he says:

"In New York City. The declaration of trust of May 30th, 1874, was drawn up in the office of Messrs. Rosborough & Merritt, Salt Lake City. I understood they were Gisborn's attorneys, and think it was drawn by Judge Rosborough. I have been in Utah four times since the date of said instrument."

Fifth Cross-Interrogatory.

"Have you any attorney in this territory, if so who is he?"

To the fifth cross-interrogatory he says:

"I have. He is Mr. W. C. Hall of Salt Lake City, Utah, who represents me in this suit."

Sixth Cross-Interrogatory.

"When did you first hear of the commencement of this suit, and did you authorize or direct it to be commenced."

To the sixth cross-interrogatory he says:

"Shortly after it was commenced. I did not author-
344 ize or direct it to be commenced, but I was advised by the plaintiff about its commencement and understood it was to be commenced and that I was to be made a party defendant to it."

Seventh Cross-Interrogatory.

"Please look at the complaint at page twelve and answer if the following allegation therein contained is true or not true? The language therein is as follows: 'Plaintiff upon its information and belief alleges, that from the date of the commencement of said work on said mine, under said trust, until on or about the
345 winter of the same year, the same was prosecuted profitably, and some twenty odd thousand dollars realized therefrom.'"

To the seventh cross-interrogatory he says:

"It is true from the date of the commencement of said work on said mine under said trust, until about the late summer of
342 the same year, (1874) the same was prosecuted profitably and some $20,000 received by me as trustee in cash therefrom."

Eighth Cross-Interrogatory.

Did you ever account to the plaintiff the Charter Oak Life Insurance Company, for whatever money you took out of the Mono mine and for all the profits."

To the eighth cross-interrogatory he says :

"I have never rendered a formal stated account to the plaintiff, the Charter Oak Life Insurance Company, for what money I took out of the Mono Mine, but they have been furnished with
346 the figures given in my answer to direct interrogatory No. 24, and to the cross-interrogatory seven and I believe with figures or statements of all expenses and receipts since. It was my rule to furnish them with all statements, accounts and advices received by me, or of which I had any knowledge or information at once, from the time when the original claim was assigned to them by Allen, Stephens & Co., and I believe they have been so furnished. I believe I always sent them the orginal accounts received from Gisborn, manager, down to when they ceased. (There have been no profits since 1874.)"

Ninth Cross-Interrogatory.

"Are there any profits in your hands, or were there any at the date of the commencement of this suit, to-wit : August 1883, unaccounted for ?"

To the ninth cross-interrogatory he says.

"There are no profits in my hands nor were there any at the date of the commencement of this suit, August, 1883, unaccounted for."

Tenth Cross-Interrogatory.

"Did you prior to June, 1883, account to the plaintiff,
347 the Charter Oak Life Insurance Company, for all moneys and profits in your hands ?"

To the tenth cross-interrogatory he says :

"In the manner stated in my answer to cross-interrogatory eight, I did prior to June, 1883, account to the plaintiff, the Charter Oak Life Insurance Company, for all expenses and receipts in my hands. There were no profits after July, 1874."

Eleventh Cross-Interrogatory.

"At the date of the commencement of this suit or prior to June, 1883, did the agents of plaintiff know that there was no
348 money in your hands to be divided or accounted for, relating to matters involved in this litigation ?"

To the eleventh cross-interrogatory he says :

"They knew from me that there was no money in my hands to be divided or accounted for relating to the matters involved in this litigation."

Counsel for plaintiff then introduced in evidence two contracts, plaintiff's "Exhibit No. 3" as follows:

"Know all men by these presents, that I, Matthew T.
349 Gisborn, of the County of Salt Lake and Territory of Utah, for and in consideration of certain moneys advanced and services rendered to me in effecting the purchase of two-thirds of the "Mono" Mining Claim and lode from my late co-tenants, which mining claim and lode is situate in Dry Canyon, Ophir Mining District, Tooele County and territory aforesaid, and are more particularly described and identified by the public survey and application for a patent therefor now pending in the United States Land Office, and are now held by William A. Stephens, of the City and County of New York, as trustee, upon trust and to and for the uses specified and enumerated in his declaration of trust executed by him in writing, and delivered to me, bearing even date herewith, do hereby agree and covenant to and with Warren Hussey, his heirs and assigns, that, as soon as the uses and purposes
350 of said trust shall be fulfilled and accomplished according to the terms of said declaration of trust (reference thereto here made for particulars), I shall and will convey to the said Warren Hussey, his heirs and assigns, by good and sufficient deed, the following described part, portion and interest in said mining claim lode and premises, viz: the one-half, undivided, of all that portion of said "Mona" Mining Claim, lode and premises, situate west of the center of a certain ravine crossing the same about two hundred feet, a little more or less from the eastern boundary of said claim and premises, which ravine is further identified as the one wherein a living spring of water rises a short distance above the north boundary of said mining claim and premises, together with a like estate of one-half, undivided, of and to all and singular the tenements, hereditaments and appurtenances in any-
351 wise belonging or appertaining to said premises, by which conveyance I shall and will convey to the said Warren Hussey, his heirs and assigns forever, as tenants in common with myself, such title as I now hold subject to said trust and also such further and higher title as I may in the meantime acquire to said mining claim and premises, free and clear from all incumbrances and liens whatsoever.

In witness whereof, I hereunto set my hand and affix my seal, this 30th day of May, 1874.

Attest: (Signed,) M. T. GISBORN. [SEAL.]

J. B. ROSBOROUGH.

JOHN T. CAINE. (Duly Acknowledged.)

Know all men by these presents, that this indenture
352 made and entered into this the 10th day of August, A. D. 1874, by and between Warren Hussey of the County of Salt Lake in the Territory of Utah, party of the first part, and William A. Stephens of the the City of New York, State of New York, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar by the said party of the second part to him cash in hand paid, as well as in further consideration of other values from said party of the second to the said party of the first part moving and given, hath granted, bargained, sold, transferred, conveyed and assigned, and by these presents doth hereby grant, bargain, sell, transfer, convey and assign, unto him the said party of the second part, and his heirs and assigns forever, all the right, title, claim, interest and demand, legal and equitable, of whatever name and nature, to which the first party of the first part is
353 now or may hereafter become entitled to, by virtue of or by reason of the foregoing instrument of writing executed and acknowledged by one M. T. Gisborn, and being dated May 30th, 1874. Together with all the right, title, claim and interest both legal and equitable of every name and nature of the said party of the first part, by reason of said instrument in writing, or otherwise, of in and to all the said property and mining interest set forth and described in said instrument in writing aforesaid executed as aforesaid by said Gisborn, and which is to be recorded herewith to identify and fix the interest and property hereby transferred and conveyed. With full power in him, the said party of the second part, to ask, recover, receive and appropriate to himself, any and all the said rights, title and interest of said Hussey set
354 forth and described in said instrument in writing so as aforesaid executed by said Gisborn.

To have and to hold all and singular the premises unto him the said party of the second part his heirs and assigns forever.

In witness whereof I the said party of the first part have hereunto subcribed my name and affixed my seal, this the day and year first herein written.

WARREN HUSSEY. [SEAL.]

Signed sealed and delivered in the presence of

W. W. RAYMOND.

JONATHAN C. ROYLE. (Duly acknowleged.)

Recorded June 12th, 1874, in book R of deeds, page 88.

R. WARBURTON, County Recorder.

Pr. F. J. H. Deputy.

355 Counsel for plaintiff next offered in evidence the files of the Third District Court in the case of John W. Kerr against Wm. A. Stephens, trustee, in the matter of the trust involved in this action; also a copy of the judgment filed with the papers showing a judgment in favor of plaintiff for the sum of $4,313.95, and $87.40, costs, appearing of record in book "D" page 24, of the records of the Third District Court, and dated July 15th 1876. Objected to by counsel for Defendant Gisborn on the ground that the same was immaterial and irrelevant, and also that the same was barred by the statutes of limitations of the Territory of Utah. Which objections were overruled by the Court and exceptions taken thereto, and thereupon the record in the said case was read in evidence.

356 Counsel for plaintiff next offered in evidence an assignment of the foregoing judgment from John W. Kerr to John W. Simpson, properly identified by the testimony of J. C. Royle, also an assignment of said judgment from John W. Simpson to the Charter Oak Life Insurance Company, plaintiff, also properly indentified. These assignments and each of them were objected to by counsel for Defendant Gisborn on the ground that the same were immaterial and irrelevant, which objections were overruled and exceptions taken thereto, and said several assignments of said judgment were thereupon read in eviednce to the Court.

Counsel for plaintiff next offered in evidence an account stated; mentioned in the complaint as follows:

First.—Between William A. Stephens, trustee, and Mrs. C. L. Torbitt for the sum of $454.83, dated April 21st, 1877, and approved in writing by Defendant Gisborn as manager for said trustee. This account stated was objected to by counsel for Defendant Gisborn, first, that the same was immaterial and irrelevant, and second,

357 because the same was barred by the statute of limitation of the Territory of Utah. Which objection was then and there overruled by the Court and exception taken thereto by Defendant Gisborn.

Second—An account stated between William A. Stephens, trustee, and George Clark upon the 21st day of April, 1877, showing a balance due said Clark for the sum of $2,227.37; approved in writing by Defendant Gisborn as manager for said Stephens, trustee.

Third—An account stated between William A. Stephens, trus-

tee and Edward Stott, upon the 24th day of April, 1877, showing a balance due said Stott of $172.19, also approved by said Defendant Gisborn as manager for William A. Stephens, trustee.

Fourth—An account stated between William A. Stephens, trustee, and Owen Long, upon the 24th day of April, 1877, showing a balance due said Long of $235.00, also approved in writing by Defendant Gisborn as manager for William A. Stephens, trustee.

Fifth—An account stated between William A. Steph-
358 ens, trustee, and Thompson & Jurgensen upon the 23rd day of April, 1877, showing a balance due said Thompson & Jurgensen of $376.69, also approved in writing by Defendant Gisborn as manager for said trustee.

Sixth—An account stated between William A. Stephens and H. E. Barstow, upon the 23rd day of April, 1877, showing a balance due said H. E. Barstow of $510.00, also approved in writing by Defendant Gisborn as manager for said trustee.

Seventh—An account stated between William A. Stephens, trustee, and the firm of Selig & Simon, upon the 23rd day of April, 1877, showing a balance due said Selig & Simon of $1,763.58, also approved by Defendant Gisborn as manager for said trustee.

Eighth—An account stated between William A Stephens, trustee, and S. P. Teasdel upon the 24th day of April, 1877, showing a balance due said Teasdel of $131.12, also approved in writing by Defendant Gisborn as manager for said trustee.

Ninth—An account stated between William A. Stephens, trustee, and George Clark upon the 14th day of May, 1877,
359 showing a balance due said Clark of $1,478.04, also approved in writing by Defendant Gisborn as manager for said trustee.

Tenth—An account stated between William A. Stephens, trustee, and George Clark upon the 3rd day of July, 1877, showing a balance due said Clark of $1,952.44, also approved in writing by said Defendant Gisborn as manager for said trustee.

Eleventh—An account stated between William A. Stephens, trustee, and George Clark upon the 16th day of August, 1877, showing a balance due said Clark of $5,139.88, also approved in writing by Defendant Gisborn as manager for said trustee.

Twelfth—An account stated between William A. Stephens, trustee, and George Clark, November 19th, 1877, show-
360 ing a balance due said Clark of $8,500.00, also approved

in writing by Defendant Gisborn as manager for said trustee.

Each and every of the foregoing accounts stated, numbered in this statement from one to twelve inclusive, was shown by the evidence of Thomas Marshall, Esq., to have been purchased by funds advanced and furnished by plaintiff and to have been assigned in writing by the several parties in whose favor said accounts were stated to plaintiff, the Charter Oak Life Insurance Company, and each and every of the foregoing accounts stated was objected to by counsel for Defendant Gisborn, upon the ground, first, that they were immaterial and irrelevant, and second, that each and every of them were barred by the statutes of limitations of the Territory of Utah at the time of the bringing of this suit. Said objections were overruled by the Court, and the evidence admitted, and to said ruling and each of them counsel for Defendant Gisborn excepted. All of said accounts stated were in writing, approved in writing thereon by Defendant Stephens, as trustee, and Gisborn as manager for said trustee, and were read in evidence, together with the assignments in writing upon each of the said accounts stated by the creditor therein transferring the same to plaintiff.

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Counsel for plaintiff next introduced in evidence a contract of lease dated December 31st, 1877, between William A. Stephens, trustee, party of the first part, and Thomas Marshall and Jonathan C. Royle and George Clark parties of the second part. Said lease was for the period of one year, commencing January 1st, 1878, and purporting to lease the property mentioned in the complaint in this action, known as the 'Mono Mine' and Mining Claim. Said lease provided amongst other provisions for the doing of certain work in the shafts, drifts and workings of said mine in a good, substantial, workmanlike manner; to keep the shafts, drifts and inclines in good order and repair; provided also for the keeping of books of account showing the expenditures upon and the yield of said mine, and have monthly statements made and furnished by the parties of the second part to the party of the first part; providing also that the party of the first should receive one-fourth of the net profits of the working of said mine, and containing also the following provision:

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"And as under the trust aforesaid of said Stephens, trustee, it is desirable that Matthew T. Gisborn, one of the parties interested in said trust shall affirm and ratisfy the same and give evidence thereof by an endorsement of his signature hereon if he deems it his interest so to do."

Now therefore it is distinctly contracted, agreed and understood between said party of the first part and said Gisborn, that the making of this lease, shall only so far as is specified in this lease, impair or prejudice the rights or interests, or rights of possession of either said party of the first part or said Gisborn, as to
363 said mining property aforesaid, or as to the trust aforesaid, or the declaration of said trust now of record ; on the contrary, the said rights, interests and rights of possession of said party of the first part and said Gisborn are continued and extended to the date of the expiration of said lease ; and upon the expiration of this said lease these rights, interests and rights of possession shall be as valid, binding and effectual as they or any of them are this day.

(Signed.) WM. A. STEPHENS, trustee.
(Signed.) THOMAS MARSHALL.
(Signed.) JONATHAN C. ROYLE.
(Signed.) GEORGE CLARK.

In consideration of the premises aforesaid and for value
364 received I do hereby authorize, ratify and confirm the foregoing lease.

(Signed.) MATTHEW T. GISBORN.

To the introduction of which evidence counsel for Defendant Gisborn objected on the ground that the same was immaterial and irrelevant, and also upon the ground that the leasing of said property by the trustee was not within the power granted by, nor within the scope of the declaration of trust. Which objections being overruled by the Court, exceptions were taken thereto by counsel for Defendant Gisborn.

Counsel for plaintiff next offered in evidence a contract of lease dated February 15th, 1879, between William A. Stephens, trustee, of the first part, and Marshall, Royle and Clark, parties of the second part, purporting to lease the property in controversy in this action for the period of one year commencing January 1st, 1879.
365 This lease provides for work, expenditures profits and accountings as in the lease dated December 31st, 1877, and further provides in terms as follows:

"And as under the trust aforesaid of said party of the first part, it is desirable that Matthew T. Gisborn, one of the parties in interest in said trust shall affirm and ratify the same, and give evidence thereof by an endorsement of his signature hereon, if he deems it his interest so to do. Now therefore, it is distinctly contracted,

agreed and understood between said party of the first part and said Gisborn, that the making of this lease, shall only so far as is specified in this lease, impair or prejudice the right or interests, or rights of possession of either of said party of the first part or said Gisborn, as to said mining property aforesaid, or as to the trust aforesaid, or the declaration of trust now of record; on the contrary, the said rights, interests and right of possession of said party of the first part and of said Gisborn are continued and extended to
366 the date of the expiration of said lease, and upon the expiration of this lease, these rights, interests and possession shall be as valid, binding and effectual as they or any of them were on the 1st day of January, 1878 or on January 1st, A. D. 1879.

In witness of all which, we have hereunto subscribed our names.

(Signed,) WM. A. STEPHENS, Trustee.
(Signed,) MARSHALL, ROYLE & CLARK."

"In consideration of the premises aforesaid and for value received, I do hereby endorse my signature upon said lease, and I do hereby authorize, ratify and confirm the foregoing lease.

(Signed,) MATT. T. GISBORN."

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367 Endorsement at the request of the Charter Oak Life Insurance Company.

"Said lease is without any prejudice to any rights that said Charter Oak Company may have in said Mono Mine property, but this endorsement hereon shall not give said company any right to terminate said lease, or interfere with said lessees under said lease, nor shall it give said company any cause of complaint against said trustee for making said lease.

Approved upon the above conditions.

CHARTER OAK LIFE INSURANCE CO.,
Of Hartford, Conn.,
By GEO. M. BARTHOLOMEW, President.
HARVEY GROUS, Secretary."

368 To the introduction of which evidence, counsel for Defendant Gisborn objected on the ground that the same was immaterial and irrevelant; also upon the ground that the leasing of said property by the trustee was not within the power granted by, nor within the scope of the declaration of trust. Which objections being overruled by the Court exception was taken there-

to by counsel for Defendant Gisborn, and each of said leases with the endorsements thereon were read in evidence.

Counsel for plaintiff next offered in evidence a duly certified copy of notice of lis pendens in this action, and the same was admitted without objection.

The foregoing is all of the evidence offered by plaintiff.

Thereupon counsel for Defendant Gisborn moved the Court for a non-suit upon the following grounds:

First. The plaintiff had not shown any reason for the foreclosure, inasmuch as they had shown the money which
369 was advanced to Mr. Stephens was advanced to him to pay for his own property.

Second. That by the declaration of trust Mr. Stephens was not entitled to take any steps by way of foreclosure or of closing up the trust.

Third. That the statute of limitations of the Territory of Utah had run against each and all of the causes of action set up by plaintiff, if any such at any time existed. Which motion having been argued and submitted to the Court was by the Court overruled, and counsel for the Defendant Gisborn thereupon excepted to the ruling.

MATTHEW T. GISBORN was then called and sworn and gave evidence in his own behalf as follows:

Q. Are you the defendant now named here?
370 A. Yes, sir.
Q. You live here in Utah?
A. I live in Tooele County.
Q. How long have you lived in Utah?
A. Since 1871.
Q. Continuously?
A. Yes, sir.
Q. Did you go to New York in the spring of 1874?
A. Yes, sir.
Q. Were you taken sick there?
A. Yes, sir.
Q. Whereabouts?
A. At the Fifth Avenue Hotel.
Q. How long were you sick?

A. Twenty-one or twenty-two days that I was not out of my room.

Q. What was the matter?

A. It was typhoid fever and pneumonia—typhoid-pneumonia.

Q. While you were sick on your bed in the Fifth Avenue Hotel do you remember a conversation between yourself and Hussey and Stephens?

A. Yes, sir.

Q. Just state what happened in your own way.

371 MR. ROYLE: What is your purpose in that?

MR. BROWN: My purpose is to show what did happen; you went into it, I suppose I have a right to show it.

A. I was there with a bond on a two-thirds interest in the Mono Mine, that is my partners' interests. Mr. Hussey was there at the time the bond expired. I think it was the first day of May, and on the 30th of April—I have got too fast. They were to serve notice on me ten days beforehand if they dissaproved of my selling, and Embody served notice on me one day too late, so I concluded that I would buy Embody's interest. I was sick—very low in fact—not able to sit up in the bed. Mr. Hussey through Mr. Stephens or somebody, negotiated for me for a hundred thousand dollars. I gave as security a trust deed on ten eighteenths of the Mono Mine, for the payment of this hundred thousand dollars. That was on the 30th day of April. After this bargain was made——

Q. What was the conversation right there at that time, if you remember?

A. Mr. Stevens was not present, I don't believe.

372 Q. You think he was not there?

A. I don't think that he was there at the time—no, sir, it was Mr. Hussey was there. You mean what was said at that time?

Q. Yes, as to the arrangement?

MR. ROYLE: If Mr. Stephens was not there we prefer that it should not be given. We have drawn out no conversation that occurred between those two gentlemen when Stephens was not present. We proved that there were three persons present.

BROWN: It was the same time the deed was executed. I suppose we may.

Objected to by plaintiff's counsel as incompetent, as neither the trustee nor any one representing him was present, or Allen, Stephens & Co., or the Charter Oak Company—none of them were pres-

ent or had any part in this conversation. It was a conversation between him and Warren Hussey, in which we have no interest.

MR. BROWN: At the time the deed was given I ask him what was said?

Objected to because the deed should speak for itself. They objected to our giving evidence of the intention of the parties in giving these papers, and upon their objection a good deal of
373 the deposition was stricken out, and we ask the same ruling against them, for the same reason, that it matters not what the intention of the parties was, the papers must speak for themselves as far as the papers can speak.

Argued by counsel for plaintiff and defendant.

COURT: I am inclined to think that a conversation between Hussey and Gisborn would not competent. There must have been some of the parties holding an opposite interest—an interest in common with the plaintiff—present at the time, of course any conversation that occurred when Mr. Stephens was present is competent. This appears to be some conversation between this defendant and Hussey.

Defendant's counsel except to the ruling of the Court.

Q. Was there any conversation when Stephens was present—when you three were present?

A. Yes, sir.

Q. What was that conversation?

A. I don't know that I can fetch it all to my memory for I was very sick at the time, and what I would remember was
374 just when my attention was called to them. It was talked of that I had acquired this loan and give security on the ten-eighteenths. Then the next conversation was for the purpose of getting Miller, Heaton and Gashweiler's interest which I had a bond on that had run out on the first day of May, and they asked me if I would guarantee that they would take the price stated in my bond—that is Gashweiler, Heaton and Miller—I told them I would. Let me see—don't let me get too fast, yes, I told them I would guarantee that and also they was to take it at the bonded price, and I was to reserve one-sixth of the mine.

MR. ROYLE: Of course we cannot anticipate what is coming out when the examination is conducted this way, here is something entirely foreign to the written contracts between the parties—he was to retain one-sixth. We move to strike it all out, and suppress all the evidence which is contradictory of the written contract.

Argued by counsel.

MR. ROYLE: Mr. Brown says the evidence is only offered to

show what led up to the contract, and not to show any different contract or contracts.

COURT: With that understanding the witness may go on.

Q. You may state what happened there; what was said between you and Hussey and Stephens?

375 A. This was when we was trying to agree on terms for the negotiation for the purchase of this other interest. I was to guarantee that they take the bonded price, which the bonds had just expired.

Q. You mean Heaton, Miller and Gashweiler?

A. Yes, sir, subject to the report of the expert who was then here or had started here, or they were going to send him—at least they was going to have an expert. I said I would do so, and I guaranteed it about this ground, this interest.

Q. Is that the whole of the talk there at that time as near as you remember?

376 A. No, sir. No. They agreed that if their expert reported favorably, that they would take the property, and if not, of course they would not have it—didn't want it. Mr. Stephens and Mr. Hussey was making preparations to come to Utah. I was not able to travel. I remained there.

Q. Now at that conversation was this declaration of trust talked of which was afterwards prepared?

A. No, sir.

Q. That was a subsequent thing?

A. Yes, sir, after we came to Utah.

Q. When you came to Utah?

A. Yes, sir.

Q. When you came to Utah just state what happened that led up to the declaration of trust?

A. When I came to Utah those trust deeds were put on record.

377 Q. Had anything been said in this other conversation as to whether they were to go on record or not?

A. They were not to go on record

Q. Who said that?

A. Mr. Hussey.

MR. ROYLE: He is going on to detail a number of contracts and arrangements between the parties which are entirely immaterial and irrelevant. I understand that Mr. Brown said the evidence is only offered for the purpose of showing what led up to the contracts and not to show any other or different contract.

BROWN: I will state it again. I don't want to repeat it all the

time—I understand that the prior contracts were merged in what happened here on the 30th of May, the other arrangements was merged in that.

MR. MARSHALL: How is it material that Mr. Hussey had promised that this first deed should not go on record? The declaration of trust recites that those deeds are made absolute,
378 they are put of record here, and for ten years there has been a record here of this. I ask that that be stricken out as immaterial and irrelevant.

Motion overruled. Exception.

Q. State what happened when you came here, previous to the contract?

A. Mr. Hussey had agreed that those should nst go on record until such time as everything was investigated. If they took the property—if their expert reported favorably and they took the property—that that should be held until such time—in fact one of them was put on—a warrentee deed—that I was ashamed to see go on record for mining ground—in fact I would not let them take it into their possession until I submitted it to my attorney. He said it didn't make any difference.

Q. You say you found it on record when you came here?

A. Yes, sir. I was ashamed of it—to put mining ground on such a deed.

379 Q. Do you know what time you arrived here?

A. I arrived in Salt Lake on the 20th day of May.

Q. Go on and state what transpired here during that ten days before the declaration of trust was made?

A. When I came here I came as far as Omaha in the blankets. Had been very sick. From there I had no bed made in the car. I got here so tired out—the next day after I came I ran around too much and was taken sick—wore out—I kept my bed pretty much the next day and I think, if I don't forget, the day after at the Walker House and got to feeling better, and I moved over to my rooms. I didn't talk any business at all until after I got over to my own rooms, and Mr. Adams who was employed by me, told me that there was some deeds on record. Well, that surprised me. The weather was so warm, I was weak and not able to run round in the sun, but would take a trip out occasionally. I was out and I met Mr. Hussey.

ROYLE: Of course, all this is under our objection that it is incompetent and irrelevant, and cannot illustrate or explain anything in the case; it goes beyond anything we attempted to
380 go into.

BROWN: My question is "what occurred between him and Hussey and Stephens after he came here?"

A. I met Mr. Hussey and I told him: "You put those deeds on record, did you?" Or the deed—"Yes," he said "that was the place for them." Says I: "You promised not to until such time as we came here and seen what the other party would do." He said: "Oh, that was the place for them." Up to that time I had had all confidence in Mr. Hussey—objected to.

Q. Just tell what the transaction was between you and Stephens?

A. All right, I will tell it as I get to it if you will allow me to.

MARSHALL: This is all incompetent. I don't know that it makes any difference, but it is not safe, of course, for a lawyer to allow incompetent evidence to come in. It is something we have nothing to do with.

ROYLE: Mr Hussey is a formal party to this suit, we make him a party because we say we understand he has some
381 interest in this property or the result of this property, but what Mr. Hussey has said or agreed or talked with Mr. Gisborn cannot bind us and I cannot see its pertinency.

MR. BROWN: Mr. Hussey was custodian of those deeds, and they claim to-day those deeds and under that recording that Mr. Hussey did.

COURT: I am of the opinion that the conversation with Mr. Huasey would not be material.

Q. What was said here with Stephens?

A. Well, I kept to my room most of the time for a day or two and this man Adams that I had employed was passing back and forth, and they was sending word to me back and forth and my intention was, as soon as I got a little stouter, to fetch suit against them for those deeds——

COURT: I suppose this is not material. They did
382 not ask for your intention.

Q. I asked you as to any talk you had with Stephens?

A. I was telling you how it came around.

COURT: He asks for conversations with Stephens.

A. Well, I will jump right to it then. I went over the next morning, in the cool of the morning or the evening, I won't say which, I went over to Mr. Hussey's bank and I met them.

Q. Met who?

A. Mr. Hussey and Mr. Stephens, and their proposition was

that they would—to put the mine under trustees, with one big trustee, to take the money out of the mine, and I was contending for the management of the mine. They would not agree to it, and they proposed to me for me to give my part, which was
383 one-third of the proceeds of the mine, on payment for this money, and it would take the money as it came out of the workings of the mine over and above expenses. I told them that was all the income I had—that I could not do it; but finally, says Mr. Stephens, "You can get some money if you need it of Mr. Hussey." Mr Hussey was then a banker here and responsible at the time. I told him that did not suit me, and I left there then. When I saw them sometime the next day, I dont remember positively, the conversation came up again—it may have been a day or two after. and they made me the same proposition to settle the matter as I spoke of—to pay as it came out of the mine, and Mr. Stephens says to me, says he: "Mr. Hussey will let you have a certain part, and Mr Hussey says if you settle I will allow you a certain part that you can draw." And finally they offered me that I would turn all the income of the mine for the payment of this money——

Q. What money?

384 A. This purchase money.

Q. The four hundred thousand?

A. The whole four hundred thousand dollars, which the notes was to be the first that was paid off—that Mr. Hussey would give me an obligation for enough that would satisfy me to get along with, as Mr. Stephens spoke of. Well, I says to Mr. Hussey, "how much would you allow me?" He made me the proposition that he would loan me from month to month one-sixth of the net income of the mine, that is, for me to turn all the proceeds for the liquidation of this and he would loan me one-sixth at 7 per cent. per annum; and if he failed to let me have the money any month when I would call for it to the amount of one-sixth, that he would pay me two per cent. a month interest on it.

MR. MARSHALL: I will save an exception to all this testimony.

Q. Was Stephens there at that time?

A. Yes, sir, Mr. Hussey and Mr. Stephens were both present.

Objected to as immaterial, irrelevant and improper.

385 COURT: This seems to be an agreement between him and Hussey about loaning him some money.

BROWN: Yes, but it was a part of the things leading up to it and to the declaration of trust.

Argued by counsel.

COURT: Proceed with your testimony.

WITNESS: It was Mr. Stevens that spoke to me first that Mr. Hussey would let me have money if I tied up the entire income. After they had made this proposition, as I have stated, I took it under consideration until the next morning I believe, and then I went back and agreed to take it, and we went to Judge
386 Rosborough's office and framed that declaration of trust, and I took Mr. Hussey's obligation in the presence of Mr. Stephens and we settled on it.

Q. The papers were there drawn, then?

A. Yes, sir.

Q. By Judge Rosborough?

A. Yes, sir.

Q. Those papers consist of the declaration of trust for one?

A. Yes, sir.

Q. Was this contract of gift to Hussey drawn at the same time?

A. Yes, sir.

Q. Did Stephens know of it?

A. Yes, sir.

Q. I show you a contract. Look at it and see if
387 that is the one that you signed there on that occasion? Exhibit X 3, shown to the witness.

A. That is not the declaration of trust.

Q. No, that is the contract by you to Hussey. Was that drawn at the same time as the declaration of trust?

A. It is my signature. Let me look over it.

Q. Where is that obligation that Hussey gave you for one-sixth—have I got it or you?

A. You have got it.

Court adjourned until ten o'clock Monday morning.

MONDAY, May 17th, 1886.

Direct examination of M. T. Gisborn continued.

388 Q. I was asking you as we adjourned on Saturday what papers were executed at the time the declaration of trust was, and was showing you a contract. Is that one of the papers executed at that time—the contract to Hussey?

A. Yes, sir.

Q. Was this paper I now show you marked "C" signed and acknowledged at the same time?

A. Yes, sir.

Q. Did Mr. Stephens talk with you about this—the one from Hussey to you?

A. Mr. Stephens was the first gentleman that spoke to me in reference to it. He said that Mr. Hussey would let me have some money.

MR. BROWN: I offer that paper.

Plaintiff's counsel object to the introduction of this evidence because the same is immaterial and irrelevant, and constitutes no equity as against the plaintiff in this suit, nor either of its assignors: and this paper limits its effect in its terms and on its face, to Gisborn and Hussey, it cuts no figure so far as we are concern
389 ed.

Argued by counsel.

MR. ROYLE: I would like to suggest an additional objection: That there is nothing in the pleadings upon which that kind of evidence can be introduced.

COURT: It seems to be an undertaking on the part of Hussey to Gisborn. I am unable to see how it would affect the rights of the plaintiff in this suit. I do not see the materiality of it. Let the the objection be sustained.

Defendant's counsel except to the ruling of the Court.

Paper marked Exhibit "Z. 1," for identification.

Q. At the time this declaration of trust was prepared and with a view to it, immediately before, was there anything said by Stephens, or by you or between you, as to the source from
390 which the money was to be derived to pay the $400,000?

Objected to as there is no issue on that subject at all. It is admitted that the $400,000 was received through Stephens as trustee. There is no denial.

Argued by counsel.

COURT: Of course, the rule is well settled where an instrument is entered into between parties that no other showing of the agreement of the parties as it was at the time, or which preceded it, can be admitted in evidence, unless it may be where there is fraud or mistake relied upon. The declaration of trust described Stephens as trustee without stating for whom he was trustee, and that involved an ambiguity. It was uncertain as to who he was trustee
391 for, and evidence was admitted to show who advanced the $400,000, and the principal controversy, as I understood was over that. It seems there was language with Mr. Stephens also, which was used, stating in substance that the mine itself as well as the rents, issues and profits—that is, that the *res* as well as the use of the property was intended by this declaration of

trust. Of course no agreement of that kind could be admitted contrary to the declaration of trust. Of course the Court, in construing the written instrument, will place itself in the position of the parties and read the instrument in the light of the circumstances which the parties had in view at the time of making it, but it has no right to give it any other language unless it is a case where there is a latent ambiguity. I do not understand that as far as this question is concerned as to the rents, issues and profits, and as to
392 whether it also includes the *res*, as we sometimes say—I dont understand that there is any ambiguity as to the use of that langage—that is a question of the mere construction of the language in the light of the circumstances under which it is made. If it is offered as proof of what the contract was at the time it is incompetent. The parties must be confined to the language in the instrument at the time.

MR. BROWN: I will put my question in the same language as Stephens' deposition: "Q. Was the $300,000 advanced on May 30th, 1874, on the security of the deed for the entire mine, or on the rents, issues and profits thereof?"

Objected to for the reason before stated.

BROWN: That is exactly in the language and is part of the interrogatory I singled out and quoted as being one that I objected to. The twenty-ninth.

COURT: If counsel offered it for any such purpose as that it was inadmissible.

BROWN: I offer it for the same purpose that that part of the deposition of Stephens, question twenty-ninth, was offered,
393 and I offer to contradict Stephens for whatever purpose that was introduced.

COURT: I do not think it is material for either side for that purpose.

Defendant's counsel except to the ruling of the Court.

Q. Who advanced the $300,000 that day? Who advanced the money that day the declaration of trust was signed or at the time the declaration of trust was signed?

A. Mr. Stephens.

Q. All of the $300,000.

A. No, sir. I loaned them $30,000.

Q. You heard this deposition of Mr. Stephens read, did you?

A. Yes, sir.

Q. You remember his speaking of your wanting to take a lease of this property later, I think in 1877, just before the Marshall & Royle lease?

A. Yes, sir.

Q. What was there about that?

A. He said I could not sign a lease to myself.

Q. Was that all that was said, was you asking for a lease? How did that come?

A. I wanted a lease, and also I wanted to be a part-
394 ner in the lease with Marshall & Royle and Clark.

Q. And that was the answer that he made you?

A. Yes, sir.

Q. That you could not make a lease to yourself?

A. Yes, sir.

Q. During the period of this active management did you advance any money for the expenses?

A. I paid my own individual expenses all the time.

Q. Any other expenses than that did you pay?

A. I paid a note signed by Holman and Adams, at McCornick's bank for $5,000 which had been given on two per cent. a month.

Q. When was that?

A. I am deficient in dates, but it was some time in 1874. $5,000 and interest.

Q. Do you know to what use the proceeds of the $5,000 note had been devoted?

Objected to by counsel for plaintift as immaterial and irrelevant under the issues. Objection overruled.

A. To pay the expenses of the mine—working expenses.

Q. Do you know whether Mr. Stephens' attention was ever called to the fact that you paid that money?

395 A. I think it was spoken of between him and me. I would not be positive, because he knew the note was out.

Q. Were there any other moneys you paid for the same purpose?

A. I paid some $600 or $700 in accounts about the same time.

Q. What kind of accounts?

A. Working expenses of the mine. Somewhere between $600 and $800. I think it was $600 or $700.

CROSS-EXAMINED BY MR. ROYLE.

Q. You say you were sick in New York at a certain date?

A. Yes, sir.

Q. How did you come to go there?

A. I went there—I had a bond on this property, this Mono

Mine—my partner's two-thirds interest. I owned one-third at the time.

Q. For what purpose did you go there with the bond?

A. I went there for the purpose of selling the two-

396 thirds interest.

Q. Did any one go with you from here?

A. Yes, sir.

Q. Who went with you?

A. Mr. Ferris.

Q. Any one else?

A. Mr. Hussey was on the train. I didn't know he was going until the night before.

Q. Mr. Hussey went with you also?

A. He went with me at the same time. I never knew he was going until the night before we started.

Q. You did know it the night before?

A. Yes, sir, the night before he told me he was going next morning.

Q. Did you have any conversation with him about selling this mine the night before?

A. No, sir, —well, let me see,—I think I did.

Q. When you got to New York you were taken sick?

A. Shortly after I got there.

Q. And you had not then negotiated the mine?

A. No, sir.

Q. Did you have any relations then in regard to the

397 matter at all?

Did he come to see you while you were sick?

A. He used to come every day I think, as near as I remember.

Q. Did you say anything to him about helping you in that matter of selling the mine?

A. He said he would aid me all he possibly could in every respect.

Q. Did you accept his offer?

A. I was willing to accept all the help I could get. I should think so—most assuredly. There was no offer made, only he would assist me.

Q. What reply did you make to that?

A. I don't remember. I told him I wished he would.

Q. Now, did he then do anything?

A. He saw Stephens—this Mr. Stephens & Co.,—and made arrangements with them for me to get a loan of a hundred thousand dollars, when I was sick in bed.

Q. While you were sick in bed, Mr. Hussey came to see you and offered to help you, you accepted his offer and authorized him to try to sell this mine, then he went and saw Stephens & Co. and arranged the matter for you?

A. In the first place I was talking of selling. Then
398 when we failed to sell—Mr. Ferris was with me trying to sell this property—when we could not sell and when the bond was about to run out, I gave this mortgage or deed of trust to raise a hundred thousand dollars to pay for Embody's interest.

Q. To keep that from running out?

A. Yes, sir.

Q. Did he help you to try to sell it at first—before you tried to get the money on it?

A. I don't know whether he tried to sell or not.

Q. Did you request him to do so while you were sick?

A. I told him if he saw any parties wishing to purchase to fetch them in. Fetch them to see me.

Q. Then you failed in that. Did you have any talk with him as to what next you would try to do?

A. With Mr. Hussey?

Q. Yes, after you failed to sell and the time was about to expire on one of these bonds?

A. It came that the bond would have run out next
399 day, and I authorized Mr. Hussey to borrow money—a hundred thousand dollars—of any parties he could get it of,—I didn't know who he could get it of—for which I would put up this ten-eighteenths interest.

Q. Did he come back and tell you who he had been talking with?

A. I don't remember that he did.

Q. Did he bring any one to see you?

A. He brought Mr. Stephens.

Q. And this leads up to what you testified in your examination in chief—Mr. Stephens came to see you?

A. Yes sir, he came with Mr. Hussey.

Q. What time did Mr. Hussey leave New York?

A. I don't remember the day that I left New York myself.

Q. Do you know whether you executed the second deed for the eight-eighteenths before you left New York?

A. Yes sir.

400 Q. You did execute it?

A. Yes, sir.

Q. The one that bears date May 6th, 1874?

A. Yes.

Q. The first one was April 30th was it not?

A. Yes.

Q. And the second one was May 6th, 1874?

A. Yes.

Q. Do you know whether Mr. Hussey stopped on his way home?

Q. Do you know who came home wirh him?

A. No, sir, I do not.

A. I do not know.

Q. You had gotten a $100,000 at that time, before Mr. Hussey left there?

A. Yes, sir.

Q. And you had given the deed of April 30th, 1874 to Stephens, trustee.

401 A. Yes, sir, for the security.

Q. You executed another deed of May 6th, 1874; to whom did you give that deed? You gave the first deed to Mr. Stephens, the second deed who did you deliver it to?

A. To Mr. Hussey.

Q. What had Mr. Hussey to do with the second deed? That would be all the title to the property, would it not?

A. Sir?

Q. The second deed would complete the title to the entire property, would it not?

A. He was merely to hold that. Neither one of those deeds was to go on record. The first deed was to go on record in case that their expert disapproved, or Heaton & Miller, or Embody refused to take the amount of money they had previously bonded for.

Q. There was $300,000 more money talked of in New York, was there?

A. Yes, sir.

Q. And Mr. Stephens was to bring this deed of May

402 6th, out here himself?

A. No, sir.

Q. Who was, who did bring it?

A. Mr. Hussey was to take care of it, and it was not to be put on record at all.

Q. Until you came?

A. No, sir. The parties would look at the mine and see whether they approved it.

Q. They were to pay the other $300,000 and the deed was to go on record?

A. No, sir. If his expert approved of it, and Heaton, Miller and Gashweiler received this amount that they had previously bonded for, then this deed was to be replaced and not to go on record, and I was to deed them one-half of the property, which would leave me clearing one-sixth in the transaction.

MR. ROYLE: We move to strike out the answer as not responsive to the question.

403 Stricken out.

Defendant's counsel except to the ruling of the Court.

Q. When you reached here who did you find representing the parties?

A. Representing what parties do you mean?

Q. Everybody in this transaction.

A. Mr. Stephens was here.

Q. When did Mr. Stephens come?

A. I don't know. I think he came with Mr. Hussey but I don't know.

Q. I was trying to get you to remember that a while ago.

A. I was in New York when they came.

Q. You did not hear any talk about his coming with Mr. Hussey?

A. I think I did.

Q. Did you hear any talk about their stopping in Chicago?

A. I don't remember of hearing of that until it was spoken of in this trial.

Q. Did you hear of their having any interview there with Mr. Allen and Mr. Blennerhasset?

A. No, sir. Not until I heard it here.

Q. At what place was this money paid over—this $300,-

404 000, addititional?

A. In Salt Lake City.

Q. At what office?

A. I think it was Wells, Fargo & Co's.

Q. Was it paid in money or by check?

A. Paid in money.

Q. Money lying on the table in the back office? Was it not paid in the back room of Wells, Fargo & Co's., office and all laid out on the table in $20,000 packages?

A. It was paid in the back room—yes. I don't know that it was in $20,000 packages.

Q. Was Mr. Marshall present when it was paid?

A. I think he was, I am not positive.

Q. Did Mr. Stephens advance that money, sir, as
405 trustee?

A. Yes, sir, all but $30,000. I loaned him $30,000.

Q. You loaned him $30,000 to advance?

A. Yes, sir.

Q. Where did you get it?

A. I got it at McCornick's bank, I believe. I had it of my own.

Q. How did you draw it, do you remember?

A. I disremember.

Q. What way did you get it?

A. I could not say. I know I furnished the money.

Q. Did you do it upon check, or did you draw and deliver the money yourself?

A. I think I got it on check.

Q. Did you draw a check and deliver the money yourself?

A. I think I got it on check, if I remember right.

Q. That was May 20th, '74, was it?

406 That was May 30th, the day this declaration of trust was made. I got back here from New York May the 20th.

Q. Did you give that money to Mr. Heaton or Mr. Stephens?

A. They said they was short——

Q. Who did you give that money to?

A. Mr. Hussey or Mr. Stephens, I don't know which I gave it to. It was Mr. Stephens spoke to me and told me he had the money coming, was $30,000 short and wanted to know if I could accomodate him. I told him I could.

Q. And you loaned him $30,000 to loan to yourself, did you?

A. Well, he was trustee.

Q. Was that money ever returned to you?

A. That money was returned all but $2,000 or $3,000 which remained in Hussey's bank after he closed.

Q. Was it all paid to your credit in Hussey's bank?

A. I don't know. I presume it was.

Q. Then if the money was loaned by you it was all placed to your credit in Mr. Hussey's bank afterwards?

A. I think it was.

Q. You have no claim to that money now?

A. No, sir.

Q. It was all put to your credit, you must have drawn it all

out of Mr. Hussey's bank, or it was all put to your credit?

407 A. I think it was—that is, the $30,000.

Q. Now, in regard to this $5,000—at what date did you advance that?

A. I don't remember the dates. I remember the facts of so doing.

Q. Who was working the property at that time?

A. Holman & Adams, or the management of Holman and Adams for the trust.

Q. That was within the first six months after the trust deed, was it not?

A. Yes, I think it was.

Q. Because they only worked it about six months, didn't they?

A. They worked it until the 16th of October, I believe.

Q. You think then it was during the first six months of the working of Holman & Adams under the deed of trust,

408 that this $5,000 was advanced?

A. It was during their working.

Q. Let me ask you if the mine was paying at that time? When Holman and Adams had charge for the first six months, was that mine paying?

A. It was not paying about the time. It had paid for a spell.

Q. During the whole six months did it pay, that Holman and Adams worked it together, did it pay?

A. I don't remember as to dates, or as to what time it was not paying—I could not say positive.

Q. Do you remember swearing in your answer to this: "This defendant on his information and belief denies the allegation that no part of the said $400,000, or of the interest thereon has been paid but alleges on information and belief that a large amount of ore has been taken out which should have been applied to the purposes of said trust and which if properly applied would have nearly or quite paid the whole of the same." You say if the money had been taken out it would almost have paid them. Now when was that taken out?

A. Oh, there was no such money taken out. There was considerable ore taken out. I don't know the amount.

Q. Was there any $400,000 worth taken out?

A. No, sir.

Q. Is the fact not that there was about $20,000 taken out of that mine, net?

A. There was $20,000 taken out net, I believe.

409 Q. How does it come then you advanced $5,000 when there was $20,000 net taken out in that time? How is it that you advanced that money?

A. There was money called for, Mr. Holman and Mr. Adams were wanting money to carry on the work and pay expenses, and they had given a note, and they were a dunning me up the note and I took a notion I would pay it off and I did do so.

Q. Was that money ever paid back to you?

A. No, sir.

Q. Where is that note?

A. At McCornick's bank.

410 Q. Have you tried to get it?

A. Yes, sir.

Q. Did you get it?

A. No, sir.

Q. What is the reason you could not get it?

A. When I paid this note off, after paying it off I called for the note, and there was unsettled business between Mr. McCornick and myself, and he said he guessed he would hold that note until that other business was settled up. He said banks never gave up any security.

Q. Was the money due from McCornick to Holman & Adams?

A. It was due from Holman & Adams to McCornick.

Q. That is what I meant?

A. Yes, I paid the note off.

Q. And McCornick held the note?

A. He said he would hold the note as a security until some other transactions between me and him was settled.

Q. Was that for money that you owed him?

A. For money that I owed General Clark, and he

411 was the agent of the general.

Q. How much was that?

A. I had borrowed $5,000 of General Clark.

Q. How does it come that you borrowed money to pay this debt?

A. I didn't borrow money to pay that debt.

Q. Why didn't you pay your own debt instead of somebody else's?

A. It had laid there until some time afterwards, until this business came up. I paid the note. The General didn't ask to draw it until a spell afterwards.

Q. Here you were owing five thousand dollars to General Clark through McCornick; why didn't you pay that instead of

going and paying somebody else's note which you had no right to pay?

A. I was trying the best I could to have the work
412 on the mine go on.

Q. Did you ever speak about that to Mr. Stephens?

A. I think I did. I think I mentioned it to Mr. Stephens.

Q. This was during the time that they were taking out largely in excess of what they were paying?

A. No, sir. This was after that. The mine was not paying then.

Q. Well, they had a surplus of $20,000, hadn't they?

A. No, sir, that surplus had been forwarded by Holman & Adams to New York to Mr. Stephens.

Q. They forwarded that to New York when they were five thousand dollars in debt here?

A. I think they must have forwarded that before the debts accumulated.

Q. I understand you that Mr. McCornick still refuses to give you that note?

A. No, sir. I asked him and he said he had forgot. It seemed like he didn't refuse.

Q. Well, until the old business was settled he did
413 refuse?

A. Yes, sir.

Q. Now, this six or seven hundred dollars worth of accounts—when was that advanced?

A. I think it was in October, '74—about that time. I would not say positive as to the date, but I think it was in October.

Q. Was that when the mine was paying?

A. No, sir, it was not paying. I advanced that to pay off indebtedness for the mine.

Q. Has that been paid back to you?

A. No, sir.

Q. Have you ever presented that claim to the trustee?

A. I never did. I told him I had paid such.

Q. And never presented the $5,000?

A. For payment—no, sir.

Q. What was the cause of the mine ceasing to pay?

A. Because there was no ore in sight, I guess.

Q. And how long did these men, Holman and Adams, work the ore in sight?

A. I should not say no ore, but no ore in paying quantities. I don't know how long they worked it. I was not in very good

health that summer and fall, and was not around the mine very close.

Q. This is the same Mr. Adams that is mentioned in the declaration of trust?

414 A. Yes, sir.

Q. In what manner did you pay that six or seven hundred dollars?

A. By accounts furnished me.

Q. Where are they?

A. I probably have them in some of my papers. I don't know.

Q. Who presented them?

A. Holman & Adams.

Q. Were they due to Holman & Adams?

A. Holman & Adams were managers for the mine and the indebtedness was for expenses in running the mine.

Q. Who was the indebtedness too?

A. I don't remember the parties—men working in the mine, etc.

Q. And you cannot now tell anything about who it was nor what for?

A. Only for mining expenses is all I can tell you.

RE-DIRECT.

Q. When you say the whole was put to your credit in Hussey's bank, do you mean the whole $30,000 or the whole $400,000?

A. The whole $30,000 I think it was.

Q. Who was the $300,000 paid to that was paid up in the back of Wells Fargo's?

MR. ROYLE: The pleadings admit that this man received the $300,000, that he received it to be paid to Miller and Heaton.

WITNESS: It was paid to Miller, Heaton and Gash-

415 weiler.

Q. Did you handle the first $100,000 yourself, or see it paid directly to Embody?

A. I presume it was paid directly to Embody. I never seen it.

Q. Was there any part of that $400,000 ever paid to you?

A. No, sir.

Q. At the time of the execution of the declaration of trust were you asked to sign notes to the amount of $300,000?

A. No, sir.

Q. Anything said about it at the time, on that occasion?

A. No, sir.

Q. I wish to ask you also about the description of the Mono Mine as contained in this contract with Hussey. Let me read it to you and ask you how much of the Mono Mine that was:

Reads description in contract with Hussey.

Q. I wish you would state whether that comprises
416 substantially all the Mono Mine?

A. It applies to the Mono Mine, it don't apply to the Mono location, but in a settlement with Houtz—in a settlement east of that ravine was to be deeded to him and the patent was issued.

Q. It was all that was left belonging to you?

A. Yes, sir.

RE-CROSS-EXAMINATION.

Q. And that east of the ravine was given to compromise one of those protest matters?

A. Yes, sir.

RE-DIRECT.

Q. So that it really comprises all of the Mono Mine that we are now litigating about?

A. Yes, sir.

Q. Do you remember the circumstances under which you executed the deed of May 6th? Do you remember them or not?

A. I remember them, it seems to me they came to my bed when I was very sick with a proposition, and I know Mr. Hussey said he would look after my interests the same as I would myself and I agreed to sign the deed and that was the whole of it.

RE-CROSS-EXAMINATION.

Q. Do I understand you to say that you never saw that
417 money—that $300,000?

A. No, sir, I don't say that. The $100,000,—I never saw the $100,000.

Q. Mr. Brown asked you about the description in a contract with Mr. Hussey to convey certain property?

A. Yes, sir, I understand it.

Q. Did you in your examination in chief yesterday or at any time, say that the transfer of that by Warren Hussey to Mr. Stephens was of the same date—the 30th of May? The same day you

executed the deed of trust, that Mr. Hussey executed this paper that was shown to you to Mr. Stephens?

MR. BROWN: I did not even show that paper to him in his examination.

WITNESS: I don't even know what paper it is.

ROYLE: Let the record show that assignment of Warren Hussey to Stephens, of all the interest that Hussey received from Gisborn, was not shown the witness and is not in evidence.

The foregoing with the Exhibits referred to, is all the evidence offered in the cause.

418 EXHIBITS "A" TO STATEMENT.

TITLE OF COURT AND CAUSE.]

TERRITORY OF UTAH, }
COUNTY OF SALT LAKE. } ss.

Arthur Brown being duly sworn, says: I am attorney in this case for Defendant Gisborn, and have had the sole management of the case since it started. I was aware that the stipulation and interrogatories had gone forward to take the deposition of Mr. William A. Stephens, but was never notified of the return of the deposition. And when preparing this case some time last week, I went over to see this deposition at the clerk's office, and was informed by the clerk that it was at Marshall & Royle's office. Presuming they were using it I did not ask them for it until the 10th day of May, at which time it was given me by Messrs. Marshall & Royle, and then was the first time that I had seen the deposition of William A Stephens.

On reading it over and examining the testimony therein mentioned and talking with my client Mr. Gisborn, as to what
419 he expects and thinks he can prove by Warren Hussey and other circumstances connected with the case, I am of the opinion that he is a very material witness for this defendant, and he cannot prove the same facts by any other witness, and cannot safely proceed to trial without his testimony. His testimony being needed to rebut the testimony of William A. Stephens in the deposition heretofore mentioned, the necesity of the testimony of Hussey was apparent and only apparent on the reading of the deposition of William A. Stephens. I am informed and believe true

that the depositition of Stephens has been in possession of attorneys for plaintiff since December 29th, 1885.

ARTHUR BROWN.

Subscribed and sworn to before me this 12th day of May, 1886.

E. B. CRITCHLOW, Notary Public,
Salt Lake County.

EXHIBIT "B" TO STATEMENT.

[TITLE OF COURT AND CAUSE.]

TERRITORY OF UTAH, }
COUNTY OF SALT LAKE. } ss.

M. T. Gisborn being first duly sworn, deposes and says, he has fully and fairly stated the facts of this cause to his attorney, Arthur Brown, who resides in Salt Lake City, and he has been advised by him, after such statement made as aforesaid,
420 that he has a good and meritorious defense to this suit on the merits thereof, which advice he verily believes to be true.

That deponent resides at Mono Mine at present, about eight miles from Stockton and eight miles from a post-office.

That deponent never saw the deposition of William A. Stephens taken in this cause until the 10th of March, 1886. That on reading the said deposition of Trustee Stephens, this defendant has been advised by his attorney, that Warren Hussey is a material witness as to certain statements therein contained, without whose testimony this defendant cannot safely proceed to trial. That Warren Hussey now resides, as he is informed and believes true, in the Cœur D'Alene country at Murray, and is carrying on a banking business, and it would take about three weeks to procure his
421 deposition, as deponent is informed and believes true, perhaps a little longer time. That deponent needs the testimony of said Warren Hussey to disprove certain statements made in the deposition of the said William A. Stephens. That this defendant expects to disprove by the said Warren Hussey the answer to the fifteenth interrogatory as given by said Stephens, reference being made to the fifteenth interrogatory herein to show what testimony is therein included.

Deponent upon information and belief, says that he expects to be able to prove by the said Warren Hussey that the assignment of

the contract set forth as an Exhibit to this testimony of Stephens, towit: A contract to convey one-half of the mine to said Hussey and the assignment of the same to William A. Stephens was arranged and agreed upon at the date of the said contract, and that the same was arranged with a view to, and at the time of the execution of the declaration of trust. That the said sum of money advanced in part for the reason and purpose of procuring an undivided half of said mine.

Deponent expects to show that in the interview in New York spoken of in the testimony of Stephens, at the time this
422 deponent was sick in bed with fever, this defendant did not assent to the agreement described in the answer to the twenty-ninth question of Stephens. And that at that time it was arranged that the deed given by defendant in April, 1874, was not to go upon the record, but was merely a guarantee that this deponent could purchase the other interest at the figure therein named if the expert of Stephens approved of the mine, and at which they were subsequently purchased, and the said deed was to be destroyed and not to take effect if the said owners of the other interest accepted the terms theretofore agreed upon, and if the trade was completed.

(Signed.) M. T. GISBORN.

Subscribed and sworn to before me this 11th day of April, 1886.

[SEAL.] E. B. CRITCHLOW,
Notary Public.

"DEFENDANT'S EXHIBITS Z I."

As a part of the consideration of a certain transaction between Matthew T. Gisborn and myself, whereby said Gisborn has
423 executed and delivered to me his certain agreement in writing, bearing even date herewith, to convey to me a certain interest in the Mono Mining Claim and premises therein described, upon and estate the execution and fulfillment of certain trusts and uses specified in said agreement, to which said claim and premises are now subject, (all of which more fully appears in a certain declaration of trust bearing even date herewith, executed and delivered by William A. Stephens, trustee in that behalf, to said Gisborn,) and as a part of said transaction between said Gisborn and myself, I do

hereby agree and promise to and with, said Matthew T. Gisborn, that I will loan to said Gisborn from month to month, on the first day of each month, during the continuance of said trust
424 commencing on the first day of July, 1874, an amount of money equal to one-sixth of the net proceeds of the said Mono Mine for and during the next immediately preceeding month on the promissory notes of said Gisborn, without other security, on interest at the rate of 7 per cent. per annum from the date of each monthly loan, payable quarterly, and the principal sum or sums to be paid on the expiration of said trust, and in case of my failure to loan said Gisborn the monthly sum as aforesaid, the several amounts of which are to be ascertained, during the continuance of the trust aforesaid, I agree and bind myself to pay to the net proceeds of said Gisborn, as fixed and liquidated damages for such failure, an amount of money equal to 2 per cent. per month on one-sixth of said mine during each month in respect to which such failure may occur, and to pay such amount equal to 2 per cent. as aforesaid monthly during the continuance of said trust.

425 But, if said Gisborn, by consent of said trustee Wm. A. Stephens, shall be allowed, during the continuance of said trust, or during any part of such time, to receive to his use as much as one-sixth of the net proceeds of said mine, then this agreement shall be inoperative and void for and during the time said Gisborn shall so receive such portion of said net proceeds.

(Signed,) WARREN HUSSEY.

[TITLE OF COURT AND CAUSE.]

And now comes the said Defendant Matthew T. Gis-
426 born, and gives notice of intention to move for a new trial on the following grounds, to-wit:

I.

That there is error in the decision of the Court on questions of law during the course of the trial.

II.

That the finding is contrary to law and contrary to evidence.

III.

Insufficiency of the evidence to justify the decision.

IV.

427 Errors in law occurring at the trial and excepted to by the Defendant Matthew T. Gisborn.

V.

Irregularities in the proceedings of the Court in this, to-wit: That the Court refused to grant a continuance upon the affidavits filed in said cause.

This motion will be made upon affidavits to be hereafter served and upon the statements of the proceedings of the trial hereafter to be prepared and served within the time allowed by the order of the Court.

Attorney for Defendant,
M. T. GISBORN.

[ENDORSED.] Title of Court and Cause. Notice of intention to move for a new trial.

Copy served this 5th day of June, A. D. 1886.

MARSHALL & ROYLE,
Attorneys for Plaintiff.

Filed July 5th, 1886.

H. G. MCMILLAN,
Deputy Clerk.

J. M. ZANE,
Clerk.

Particulars in which the evidence is insufficient to justify the findings of fact:

I.

The second finding of fact is not supported by the evidence, and there is no evidence to base it upon in this: The find
428 ing. "And said Gisborn was desirous of purchasing the the same, and not having money of his own with which to do so, borrowed the money to purchase the same as hereinafter set forth," is not justified by the evidence, for the reason, that the contract, or declaration of trust between the parties, shows that he did not borrow the money, and no conversation or negotiation between the parties is shown tending to show that Gisborn stood in the position of borrower of money. The finding that he Gisborn "did purchase and pay for the said interests of his said co-tenants," is not supported by the evidence, for the reason that it appears that he did not purchase the interests of his co-tenants, but that the same was deeded to and purchased by Stephens himself,
429 as appears from Stephens' evidence. The finding, that "the title to said two-thirds interest in said premises so purchased and paid for by said Gisborn," is not found in the evi-

dence, for the reason that it appears that prior to the delivery of the deeds to him Gisborn had executed deeds to Stephens.

The finding that Gisborn "caused the same to be recorded in the Recorder's Office" is contrary to the evidence, for the reason that it appears that Gisborn was not here at the time it was recorded, and all the testimony that was produced on the subject shows that Hussey, as agent for Stephens, recorded the deeds. The remainder of the second finding of fact is based on these quoted parts, and is not supported by the evidence for the same reasons.

II.

The evidence is insufficient to justify the third finding
430 of fact, in this: Instead of showing that Gisborn solicited and obtained a loan from said Stephens, trustee, of the sum of $400,000, the contract between the parties indicates and the other evidence shows that Stephens did loan the money to Gisborn as a loan, but advanced it for his own purpose to enable him to purchase an interest in the property, and for that purpose advanced money for the purchase of the property from Gisborn's co-tenants. And the finding "and did therewith purchase and pay for said interests," is contrary to the evidence of Stephens himself, which shows that he had a contract for and was the owner of one-half of the mine.

The finding that "on the 30th day of May, Stephens,
431 trustee, advanced and paid Gisborn $300,000" is contradicted by the evidence which shows that money was paid to Stephens at his own motion and for his own purpose to the co-tenants and to accomplish it he borrowed $30,000 of Gisborn.

The remainder of the third finding of fact is unsupported by the evidence for the reason that it all depends upon the finding that the relation of borrower and loaner existed between Stephens, trustee, and Gisborn, whereas, the contract shows that relation did not exist.

III.

The evidence is insufficient to support the fourth finding of fact for the reason that the contract shows that Stephens was trustee for Gisborn and for no other person, and the finding "that
432 said Stephens, trustee in said transactions with said Gisborn, and in arranging and fixing the terms of said loan, and in making said loan of $400,000 to said Gisborn, was acting as trustee for, and was trustee for said Allen, Stephens & Co.," is contrary to the written agreement and the other evidence in the case.

That the negotiations between the parties are not confined to three "certain writings" but there were other writings executed about the same time and should be construed with said three "certain writings," which are not annexed to the complaint, but which are found annexed to the deposition of William A. Stephens and are found in the statement.

The finding that "said Stephens as trustee, acquired the legal title to all that certain real estate" described in the complaint, is not justified by the evidence for the reason that it appears at
433 the time of receiving the deeds to the real estate, also executed back of the declaration of trust, and the papers executed at that time show that he did not acquire the legal title to the real estate but only the right to take the rents, issues and profits thereof.

IV.

The evidence is insufficient to justify the sixth finding of fact. The finding that Stephens "has continued to perform the duties of his trust with reasonable care and diligence," is contrary to the evidence; it appearing from the evidence that he only continued the business according to the terms of the trust for less than six months; that he only continued to exercise the trust at all until some time in the year of 1877, and that in that year he abandoned and forsook the exercise of the trust—gave it up. Also
434 for reason that it appears that instead of applying the proceeds obtained by him to the payment of expenses, he appropriated the proceeds and allowed the expenses to go to judgment.

V.

The seventh finding of fact is unsupported by the evidence and is insufficient to justify that finding in this: It does not in any way appear that the Mono Mining Company was authorized to contract debts against the property, or that Stephens and Gisborn were copartners or that Stephens was justified in incurring indebtedness upon the mine for any sum whatsoever. No evidence tends to show any negotiation or conversation or contract authorizing him to incur debts on the faith of the property. The evidence also is insufficient to justify the finding, for the reason that it appears that each and all of said debts were long since outlawed and barred by the statute of limitations.

VI.

The evidence is insufficient to justify the ninth finding of fact for

the reason that the said trustee has not faithfully endeav-
435 ored to execute the said trust, and has not endeavored to execute it at all, but that in the year 1877, he abandoned the trust, vacated the property and never since has in the remotest manner attempted to execute the trust or to make the property available in any manner whatsoever, except by trying to sell the same under this foreclosure. There is no evidence whatever that Gisborn ever notified Stephens that he could not pay any of the debt, nor is there any evidence that he was obliged to pay the debts.

VII

The tenth finding of fact, "with the agreement in writing from said Gisborn upon said leases, stated in said complaint," is erre-
neous; a comparison of the two shows them to be differ-
436 ent, that is, the agreement stated in complaint is different from agreement on both of leases.

VIII.

The 11th finding of fact is unsupported by the evidence in this: No authority for executing the assignment was shown. There was no loan; and as there was no loan from Stephens to Gisborn none could be assigned, either bearing interest at seven per cent. or any other sum.

IX.

The evidence is insufficient to justify the twelfth finding "That said Gisborn has not advanced any money to said trustee, in the execution of said trust, or any money chargeable in this action upon said trust estate," for the reason that the evidence of Gisborn,
which was entirely uncontradicted, was that he had at one
437 time furnished $5,000 and at another time six or seven hundred dollars. That although evidence was accessible to contradict this statement if not true, none was offered; and Gisborn was entitled to have the said $5,000 placed with the other items claimed to be charged against the estate.

X.

The fourteenth finding is unsupported by the evidence for the reason stated in specifications of the ninth finding. It is not true "that he has not at any time abandoned the trust," but in 1877 he wholly abandoned and neglected the duties thereof.

XI.

The evidence is insufficient to justify the fifteenth find-

438 ing, "that it was the intention of said Gisborn and said Stephens in creating said trust, that if it became necessary to pay the indebtedness, future and prospective profits should be realized by the sale of said real estate, the said mine and mining premises; that the words in said trust, 'the issues, rents and profits of the said premises' in a court of equity, under the facts in this case, carries the right and power of the court to order and decree a sale of said premises to satisfy the liens thereon," is without any basis whatsoever, in any fact; the language of the written contract itself does not bear that interpretation the prior negotiation and conversation between the parties, does not bear that interpretation.

429 No word whatever is pretended to have been said by any witness, authorizing Stephens to sell the mine in case the rents, issues and profits should be insufficient; on the contrary, the evidence shows and the complaint alleges that both parties believed that the rents, issues and profits would be sufficient to pay all the sum of money provided for, and no contract was made on any other contingency, and the property was not placed in Stephens' hands for any other purpose than to use the rents, issues and profits. No evidence was offered on the subject and the matter quoted should not be stated as a finding of fact.

The finding, "that said trustee is now entitled to the use of said property," is not justified by the evidence, for the reason that he had abandoned the use of the said property for a period so long that his right to it is now barred by the statute of limitations.

440 The finding, "that the said premises should be sold and the proceeds applied to paying off the liens in the order specified in said declaration of trust," is entirely unsupported by the evidence, as no witness testified and no written paper given in evidence of any such arrangement or contract.

XII.

The seventeenth finding of fact is unsupported by the evidence for the reason that it appears that each and all of those claims were unauthorized and are barred by the statute of limitations.

XIII.

The eighteenth finding of fact is unsupported by the evidence for the reason that it is all founded on the basis that the money mentioned in the declaration of trust was a loan from Stephens to Gisborn, when in truth that was not the arrangement or understanding of the parties, as appears by that contract.

XIV.

441 The nineteenth finding of fact is unsupported by the evidence, and the evidence is insufficient to warrant it, for the reason that many of the facts heretofore found in the other eighteen findings are contradictory to the complaint, and so far ar the complaint is not founded on the written papers themselves has no support outside in the evidence.

ERRORS OF LAW.

Defendant Matthew T. Gisborn specifies the following as errors of law occurring at the trial, and duly ~~excepted~~ accepted to at the time:

I.

The Court erred in overruling Defendant Gisborn's motion for a continuance or postponement of the trial of this cause.

II.

The Court erred in receiving evidence and proceeding with the trial of the cause over the objection of the counsel for the Defendant Gisborn that cause was not at issue.

III.

The Court erred in overruling the objection of counsel for Gisborn to the fourth interrogatory.

442 IV.

The Court erred in overruling the objection made by counsel for Defendant Gisborn to the answer of the fourth interrogatory, and in admitting the same as evidence.

V.

The Court erred in overruling objection of counsel for Defendant Gisborn to the sixth interrogatory.

VI.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the answer to the sixth interrogatory and in admitting the same in evidence.

VII.

The Court erred in overruling the objection of counsel for Gisborn made to the seventh interrogatory in deposition of Stephens.

VIII.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the eighth interrogatory in deposition of
443 Stephens.

IX.

The Court erred in overruling objection made by counsel for Defendant Gisborn to the ninth interrogatory of deposition of Stephens.

X.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the introduction of in evidence of the four promissory notes for $25,000.00 each of Gisborn and Hussey to Stephens.

XI.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the tenth interrogatory of the deposition of Stephens.

XII.

The Court erred in overruling the objection made by counsel for Defendant Gisborn to the eleventh interrogatory of the deposition of Stephens.

XIII.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the introduction in evidence of the assignment from Allen, Stephens & Co., to the Charter Oak Life Insurance Co.

XIV.

444 The Court erred in overruling the objection of counsel for Defendant Gisborn to that part of the answer to the twelfth interrogatory of Stephens' deposition which reads: "The acknowledgment thereto states the truth."

XV.

The Court erred in overruling the objection made by counsel for Defendant Gisborn to the thirteenth interrogatory of Stephens' deposition.

XVI.

The Court erred in overruling the objection made by counsel

for Defendant Gisborn to the answer to the seventeenth interrogatory of Stephens' deposition.

XVII.

The Court erred in overruling the objection of counsel for Gisborn to the admission in evidence of the letter of April 21st, 1877, Stephens to Gisborn.

XVIII.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the admission in evidence of the letter, Gisborn to Stephens, April 21st, 1879.

XIX.

445 The Court erred in overruling the objection of counsel for Defendant Gisborn to the admission in evidence of the letter, Gisborn to Stephens of July 14th, 1879.

XX.

The Court erred in overruling the objection of counsel for Gisborn to the eighteenth interrogatory in Stephens' deposition.

XXI.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the ninteenth interrogatory in Stephens' deposition.

XXII.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the twentieth interrogatory and answer thereto in deposition of Stephens.

XXIII.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the twenty-first interrogatory of the deposition of Stephens.

XXIV.

446 The Court erred in overruling the objection of counsel for Defendant Gisborn to the twenty-third interrogatory of deposition of Stephens.

XXV.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the twenty-fourth interrogatory in deposition of Stephens.

XXVI.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the answer to the twenty-fifth interrogatory of deposition of Stephens.

XXVII.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the twenty-sixth interrogatory of deposition of Stephens.

XXVIII.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the answer to the twenty-seventh interrogatory of deposition of Stephens.

XXIX.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the twenty-eighth interrogatory of de-
447 position of Stephens.

XXX.

The Court erred in overruling the objection of counsel for Defendant Gisborn to the twenty-ninth interrogatory of Stephens' deposition.

XXXI.

The Court erred in overruling the objection made to the first part of the answer to the twenty-ninth interrogatory in Stephens' deposition, beginning at the commencement of the answer and ending with the words, "of the transaction."

XXXII.

The Court erred in overruling the second objection made to the answer to the twenty-ninth interrogatory in Stephens' deposition, beginning with the words "and finally" and ending with the words "entire mine."

XXXIII.

448 The Court erred in overruling the objection of counsel for Gisborn to the third portion of the answer of Stephens to the twenty-ninth interrogatory, to-wit: The portion beginning at the words "as between my partners and myself" and so on to end of the answer.

XXXIV.

The Court erred in overruling the objection of counsel for Gis-

born to the admission in evidence of the files and the copy of the judgment of Third District Court in the copy of John W. Kerr vs. Wm. A. Stephens, trustee.

XXXV.

The Court erred in overruling the objections of counsel for Gisborn to the introduction in evidence of the assignments
449 from Kerr to Simpson and from Simpson to the plaintiff.

XXXVI.

The Court erred in overruling the objections of counsel to the admission in evidence of the account stated between Stephens and Torbitt for $454.83.

XXXVII.

The Court erred in overruling the objections of counsel for Gisborn to the introduction in evidence of the accounts stated between Stephens and Clark for $2,227.37.

XXXVIII.

The Court erred in admitting in evidence the account stated between Stephens and Stott for $172.19.

XXXIX.

The Court erred in admitting in evidence the account stated between Stephens trustee, and Long for $235.

XL.

The Court erred in admitting in evidence the account stated between Stephens, trustee, and Thompson & Jurgensen for $376.69.

XLI.

450 The Court erred in admitting in evidence the account stated between Stephens, trustee, and Barstow for $510.

XLII.

The Court erred in admitting in evidence the account stated between Stephens, trustee, and Selig & Simon for $1,763.58.

XLIII.

The Court erred in admitting in evidence the account stated between Stephens, trustee, and S. P. Teasdel for $131.12.

XLIV.

The Court erred in admitting in evidence the account stated

between Stephens, trustee, and Clark, May 14th, 1877 for $1,478.04.

XLV.

The Court erred in admitting in evidence the account stated between Stephens, trustee, and Clark dated July 3rd, 1877, for $1,952.44.

XLVI.

451 The Court erred in admitting in evidence the account stated between Stephens, trustee, aud Clark dated August 16th, 1877, for $5,139.88.

XLVII.

The Court erred in admitting in evidence the account stated between Stephens, trustee, and Clark, November 19th, 1877, for $8,500.

XLVIII.

The Court erred in admitting in evidence the first lease from Stephens to Marshall, Royle and Clark, dated December 31st, 1877.

XLIX.

The Court erred in admitting in evidence the second lease from Stephens to Marshall, Royle and Clark dated February 15th, 1879.

L.

452 The Court erred in overruling and denying the motion for a non suit, made by counsel for Defendant Gisborn.

LI.

The Court erred in refusing to allow the witness Gisborn to state what conversation took place between himself and Hussey at the time of giving of the deed of the 30th of April, 1877.

LII.

The Court erred in refusing to admit in evidence the undertaking of Hussey to Gisborn offered by counsel for Gisborn, and marked Z 1.

LIII.

The Court erred in refusing to allow the witness Gisborn to answer the question: "Q. Was the $300,000 advanced on May

30th, 1874, on the security of the deed for the entire mine, or on the rents, issues and profits thereof?"

LIV.

The Court erred in granting the motion of counsel for plaintiff to strike out the answer of Witness Gisborn on cross-ex-
453 amination, being the answer to the question, "They were to pay the other $300,000 and the deed was to go on record."

The Court erred in his conclusions of law and in the judgment as follows :

LV.

The Court erred in finding as conclusion of law that William A. Stephens still holds the legal title to said mining premises.

LVI.

The Court erred as conclusions of law in finding that the indebtedness incurred by Stephens is a subsisting indebtedness against the property.

LVII.

In finding that it amounts to $51,796.30.

LVIII.

In finding that the plaintiff is entitled to the first lien upon the premises to satisfy the said sum.

LIX.

In finding that plaintiff is the legal owner and holder
454 of the pretended indebtedness over Gisborn.

LX.

In finding that the said indebtedness was a loan to said Gisborn

LXI.

In finding that the said indebtedness is a lien upon the said property.

LXII.

In finding that it is of the aggregate amount of $721,649.35.

LXIII.

In holding and finding that the plaintiff is entitled to satisfy all of the said sum out of the said property.

LXIV.

The Court erred in holding and finding that the plaintiff is entitled to a decree of this Court subjecting the said entire premises to sale to satisfy the said liens or any part thereof.

LXV.

The Court erred in rendering the judgment and signing the decree in this case.

455

LXVI.

The judgment and decree in this case are not justified or authorized by the findings and pleadings in this case.

ARTHUR BROWN,
Attorney for Defendant Gisborn.

We hereby certify that the foregoing is a full, true and correct statement of the evidence and proceedings in this cause, to be used upon motion for new trial and upon appeal.

MARSHALL & ROYLE,
Attorneys for Plaintiff.
ARTHUR BROWN,
Attorney for Defendant Gisborn.

Dated at Salt Lake City, August 10th, 1886.

The foregoing is hereby settled as the statement in this cause.

C. S. ZANE,
(Dated.) Judge Third District Court.

[ENDORSED.] Title of Cause. Statement upon motion for new trial and upon appeal.

Filed this 27th day of July, 1886.

J. M. ZANE,
Clerk Third District Court.

By H. G. MCMILLAN, Deputy Clerk.

Service of within acknowledged this 27th day of July, 1886.

MARSHALL & ROYLE,
Attorneys for Plaintiff.

Filed, August 12th, 1886, after settlement.

J. M. ZANE, Clerk.

By H. G. MCMILLAN, Deputy Clerk.

152½ In the Third Judicial District Court, Utah Territory, County of Salt Lake.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, Plaintiff,
vs.
WILLIAM A. STEPHENS, Trustee; M. T. GISBORN, Defendants.

It is hereby stipulated by and between the attorneys for the parties above named that the time for filing the record on appeal in the supreme court of this Territory is hereby extended for a period of ten days.

Dated May 4th, 1887.

MARSHALL & ROYLE,
Att'ys for Pl'ff.
ARTHUR BROWN,
Att'y for Def't.

Filed May 7th, 1887.
J. M. ZANE, *Clerk,*
By H. G. McMILLAN, *Deputy Clerk.*

153 Title of Court and Cause.

Notice of Appeal.

To the clerk of the third judicial district court and to Messrs. Marshall & Royle, attorneys for plaintiff:

You will please take notice that the defendant herein, Matthew T. Gisborn, hereby appeals to the supreme court of Utah Territory from the judgment and decree made and rendered in this cause in said third judicial district court on the 20th day of May, A. D. 1886, in favor of the above-named plaintiff and against the said Matthew T. Gisborn, defendant, and from the whole thereof.

ARTHUR BROWN,
Attorney for Defendant Gisborn.

Dated April 4th, 1887.

Service of copy accepted this April 6th, 1887.
MARSHALL & ROYLE,
Attorneys for Plaintiff.

Filed April 6th, 1887.

Title of Court and Cause.

Undertaking upon Appeal.

Whereas the defendant in the above-entitled action, Matthew T. Gisborn, is about to appeal to the supreme court of the Territory of Utah from a judgment and decree entered against him in said action in the said third judicial district court in favor of the said plaintiff in

said action on the 20th day of May, A. D. 1886, decreeing to the said plaintiff the sale of certain premises, known as the Mono mine, in Tooele county, Utah, and granting certain other relief, as will in said decree more fully appear:

Now, therefore, we, the undersigned, Arthur Brown, of the city and county of Salt Lake, Utah, and Charles E. Mitchener, of the county of Tooele, Utah, in consideration of the premises and of such appeal, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against said appellant on the appeal or on a dismissal thereof, not exceeding the sum
154 of three hundred ($300) dollars, to which amount we acknowledge ourselves jointly and severally bound.

ARTHUR BROWN.
C. E. MITCHENER.

Dated April 4th, 1887.

TERRITORY OF UTAH, } ss:
County of Tooele, }

Charles E. Mitchener, being first duly sworn, deposes and says that he is a resident freeholder within the Territory of Utah; that he is worth the sum specified in the foregoing undertaking ($300) over and above all his just debts and liabilities and exclusive of property exempt from execution.

C. E. MITCHENER.

Subscribed and sworn to me before me this 5th day of April, 1887.
[SEAL.] EDWARD P. MITCHENER,
Notary Public.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Arthur Brown, being first duly sworn, deposes and says: I am a resident freeholder within the Territory of Utah, and am worth the sum specified in the foregoing undertaking, $300.00, over and above my just debts and liabilities and exclusive of property exempt from execution.

ARTHUR BROWN.

Subscribed and sworn to before me this 6th day of April, 1887.
E. B. CRITCHLOW,
Notary Public.

Filed April 6th, 1887.

We hereby certify that we have examined the foregoing and find it a true transcript of the record in said cause.

MARSHALL & ROYLE,
Attorneys for Plaintiff.
ARTHUR BROWN,
Att'y for Gisborn.

155 THURSDAY, *June 16th, A. D.* 1887.

A session of the supreme court of Utah Territory was held this day, beginning at ten o'clock a. m., pursuant to adjournment.

Present: All the justices, the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * *

THE CHARTER OAK LIFE INS. CO., Respondent,
vs.
MATTHEW T. GISBORN, Impleaded with Others, Appellant. } From 3d Dist.

This cause, coming on regularly for hearing, was argued by Arthur Brown for appellant.

* * * * * * *

C. S. ZANE, *C. J.*
JACOB S. BOREMAN, *A. J.*
H. P. HENDERSON, *A. J.*

FRIDAY, *June 17th, A. D.* 1887.

A session of the supreme court of Utah Territory was held this day, beginning at ten o'clock a. m., pursuant to adjournment.

Present: All the justices, the clerk, marshal, and members of the bar.

Court was duly opened

* * * * * *

THE CHARTER OAK LIFE INS. CO., Respondent,
vs.
MATTHEW T. GISBORN, Impleaded with Others, Appellant. } From 3d Dist.

156 This cause was further argued by Arthur Brown for appellant, by Mr. Royle and T. Marshall for respondent, submitted, and taken under advisement.

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C. S. ZANE, *C. J.*
JACOB S. BOREMAN, *A. J.*
H. P. HENDERSON, *A. J.*

MONDAY, *October 17th, A. D.* 1887.

A session of the supreme court of Utah Territory was held this day, beginning at ten o'clock a. m., pursuant to adjournment.

Present and presiding: The Hon. C. S. Zane, chief justice; present, also, the Hon. J. S. Boreman, associate justice; the Hon. H. P. Henderson, associate justice; the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * *

THE CHARTER OAK LIFE INSURANCE COMPANY, Respondent,
vs.
MATTHEW T. GISBORN, Impleaded with Others, Appellant.
} From 3d Dist.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, adjudged, and decreed that the judgment and decree of the district court therein be, and the same is hereby, affirmed, and that respondent have and recover of and from appellant its costs herein.

Thereupon said appellant, by his counsel, Arthur Brown, Esq., asked the allowance of an appeal from this judgment to the
157 Supreme Court of the United States, and that the amount of the penal sum of a bond on such appeal be fixed, and, counsel of appellant being present and not objecting, it is ordered that the appeal so asked be, and it is hereby, allowed, and that the amount of such penal sum of said bond be and is fixed at $300.00.

* * * * * * *

C. S. ZANE, *C. J.*
JACOB S. BOREMAN, *A. J.*
H. P. HENDERSON, *A. J.*

THURSDAY, *October 20th, A. D.* 1887.

* * * * * * *

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONN., Plaintiff and Respondent,
vs.
MATTHEW T. GISBORN, Impleaded with Others, Defendant and Appellant.

A bond on the appeal of this cause to the Supreme Court of the United States was presented by counsel of appellant and approved by the court.

* * * * * * *

C. S. ZANE, *C. J.*
JACOB S. BOREMAN, *A. J.*
H. P. HENDERSON, *A. J.*

158 In the Supreme Court of Utah Territory, June Term, 1887.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a Corporate Body, Plaintiff and Respondent,

vs.

WILLIAM A. STEPHENS, as Trustee; MATHEW T. GISBORN, ALLEN, Stephens & Co., William A. Stephens, Herman Blennerhassett, B. F. Allen, Hoyt Sherman, as Assignee in Bankruptcy of B. F. Allen, Bankrupt, and Warren Hussy, Defendants.

Appeal of defendant Mathew Gisborn.

BOREMAN, justice, delivered the opinion of the court:

This is an appeal from a judgement. In the spring of 1874 the appellant, Mathew T. Gisborn, was the owner of one-third interest in the Mono mine, situated in Ophir mining district, Tooele county, in this Territory. He obtained a bond upon the other two-thirds from his co-owners, Embody, Miller, and Heaton, and then went to New York to sell this two-thirds. Failing in this, he borrowed one hundred thousand dollars with which to buy the interest of Embody, one of his co-owners, which was four-eighteenths of the mine. The money was furnished through defendant Stephens, trustee, and paid to Embody, and Embody made the deed of his interest to Gisborn. In return for the money thus advanced by Stephens, trustee, the appellant conveyed to him by deed, absolute on its face, all of his original interest and all of the interest he had obtained from Embody,

159 which two interests together amounted to ten-eighteenths of the mine. The money thus furnished came from Allen, Stephens & Co., of which firm Stephens was a member. Stephens likewise afterwards furnished three hundred thousand dollars more to enable Gisborn to buy the residue of the two-thirds of the mine, the same being the interests of Miller and Heaton, his co-owners in the mine. This money, according to agreement with Gisborn, was paid to his said co-owners in the mine and the deed made to Gisborn, and then Gisborn, by deed absolute on its face, conveyed the same over to Stephens, trustee. Thus Stephens, trustee, held the title to the whole of the mine. Thereupon Stephens, in accordance with the wishes of Gisborn, made a declaration of trust, showing that the two deeds above mentioned of Gisborn to Stephens, trustee, were not in fact absolute deeds, although on their faces they appeared to be such, but were made upon trusts, and that Stephens held the property in trust, to receive the "rents, issue-, and profits" of the mine, and to pay therefrom the expenses of operating the mine; then to pay back the four hundred thousand dollars obtained through Stephens, trustee; then to pay Gisborn a percentage on a third of the rents, issues, and profits, and to pay Gisborn two hundred and seventy-five thousand dollars. After these several amounts should be paid, then the trustee, Stephens, was to cancel the two deeds referred to on the record, thus, according to the declaration of trust, leaving the title to the whole property finally in Gisborn. He by s subsequent contract with Hussy agreed to convey half of the mine to Hussy for money and services rendered,

and afterwards Hussy transferred said half interest to Stephens individually. The trustee entered upon the discharge of his duties in carrying out the trust, but the amount of ore that could be obtained from the mine decreased so rapidly that the whole output of the mine after the trustee took hold of it only netted some
160 twenty thousand dollars, and thereafter failed completely, the vein being lost. The work on the mine was done under the trustee by two managing agents specified in the declaration of trust, the one being chosen by Gisborn, the other by the trustee. In a fruitless endeavor to find the ore vein there were heavy expenditures, amounting to nearly fifty-two thousand dollars beyond the ability of the trustee to pay. The debts thus incurred were not paid by the trustee, but were taken up by the respondent, to whom they were assigned. Allen, Stephens & Co. assigned their claims also to the respondent, including the claim of four hundred thousand dollars above referred to and advanced through Stephens, trustee. The present action was brought to subject the mining property itself to the payment of the whole indebtedness, and that the same might be declared to be charges and liens thereon. Gisborn, one of the defendants, contests the right of respondent to this. The judgement of the district court being in favor of the respondent, the appellant, Gisborn, has brought the case to this court by appeal from that judgement.

The appellant contends that the claims set up as the basis of the complaint are not debts against him or the mine and have never existed as such; that the four hundred thousand dollars never were a debt at all, but were purchase-money. He urges that if such claims ever existed as debts it was against the "rents, issues, and profits" of the mine, and that the "rents, issues, and profits" do not include the property itself or the sale thereof.

No personal judgement is sought against the appellant. Whether, therefor-, the claims ever existed as debts against him personally is in this action not material.

The first question, then, for our consideration is whether the four hundred thousand dollars were purchase-money or not. The
161 appellant claims that the whole transaction showed that a purchase of the property or of two-thirds thereof by Stephens, trustee, was the aim and object of the parties, and that Gisborn was only security in the matter and helping Stephens to make his purchase. Gisborn went to New York, it appears, among strangers, if this theory be true, to help a stranger to buy two-thirds of the mine from his co-owners. Gisborn, however, in his testimony says that when he went to New York he first talked of making the sale of the two-thirds upon which he held a bond, but that he failed to make the sale. He then borrowed one hundred thousand dollars, and afterwards three hundred thousand dollars more were advanced through the same channel. If a sale to Stephens, trustee, was the intention, we are unable to see why the whole of the mine was conveyed to Stephens, trustee, when he was only buying two-thirds, nor do we see that there was any necessity for the declaration of trust, An absolute deed of two-thirds of the mine by Gisborn to Stephens.

trustee, would have answered every purpose; but it would seem that the question whether the four hundred thousand dollars were a loan or purchase-money is settled by the requirement set forth in the declaration of trust; that this four hundred thousand dollars were to be paid back to the party who advanced it, and that Stephens, trustee, was not to hold the mine after the sums of money specified in the declaration of trust had been paid, but the title to the whole mine was to revert to Gisborn. The parties who furnished the money through Stephens, trustee, were to have nothing further to do with the property after they should get back the money which *whey* had advanced. If the title of the mine was to revert to Gisborn it could not have been a sale to Stephens nor to Allen, Stephens & Co. The provision in the declaration of trust that Gisborn was to have title to the property after the payment of
162 the sums of money thereinafter specified wholly precludes the idea that at that time the parties contemplated a purchase of the property or of two-thirds of it by Stephens or by Stephens, trustee, or by Allen, Stephens & Co. The idea of the sale and that the purchaser was not to get the title are not consistent. But it is said that we should consider what was to take place after these sums were paid off and the title placed in Gisborn, and that if this were done a sale would appear to have been the ultimate object of the whole transaction. The evidence tends to show that subsequent to the payment of the sums referred to and subsequent to the title being placed in Gisborn a conveyance was to be made by Gisborn to Hussy of one-half of the mine, and that thereafter Hussy was to convey such half interest to Stephens individually. We do not think that we are authorized to consider these matters which were to occur after the payment of the sums referred to and after the title should be placed in Gisborn unless they were part of the contract or transaction of which the declaration of trust was the "final act;" for it does not appear nor is it claimed that after the execution of the declaration of trust there was any new contract between Gisborn and Stephens or any alteration in the old contracts. The two deeds by Gisborn to Stephens, trustee, and the declaration of trust which followed embodied the terms of the contract between the parties. We can perhaps consider the oral statements prior to and contemporaneous with these written contracts in order to arrive at a correct interpretation of the — whereever the meaning is doubtful; but when the proof shows, and it is admitted that the declaration of trust was the final act, it is not com-
petent for us to allow that by any oral evidence the plain
163 letter of the writ-en contract can be contradicted or changed, nor can we consider what may have occurred after the execution of the declaration of trust; but if the four hundred thousand dollars be treated as purchase-money and the whole transaction treated as a conveyance to Stephens of the one-half of the mine or of thirteen-eighteenths of it, yet such purchase could not result in a transfer of the title for any interest to Stephens until the purchase-money had been paid back to him or to those who furnished it through him. The buyer, according to the theory of appellant, was

to have no title until all the purchase-money which he had paid should be returned to him. That would be an anamilous proceeding, yet exactly what would have occurred if the transaction were a sale of the property to Stephens and not a loan of money by him or those acting through him, and if the purchaser was to have no title until the purchase-money was paid back to him, we are at a loss to see what was to be or could be the consideration for the transfer of the title to the purchaser. With the purchase-money all paid back it is evident that no consideration for a conveyance of the title to the purchaser existed. In reason and equity it would seem that when the four hundred thousand dollars, the only consideration mentioned in the transaction, should be paid back the title to the property would revert to the seller. If Embody, Heaton, and Miller, therefore, were the sellers, as is claimed, the title would naturally fall to them in such a contingency; but the contract expressly provides that the title shall go to Gisborn and not to Embody, Heaton, and Miller. The conclusion would be that he, Gisborn, was the seller, if the transaction was a sale, and that is what the face of the papers shows him to have been if a sale took place. He 164 is the one who made the deeds to Stephens. He is the one for whom the declaration of trust was made. The whole transaction shows that Embody, Heaton, and Miller, the co-owners in the mine with Gisborn, were entirely out of the whole matter when they received the pay for their interests. Such interests were two-thirds of the mine and not simply two-thirds of the rents, issues, and profits. They lay no claim to any interests in the mine now, and the money that caused them to release their hold upon it and convey their interests to Gisborn came through Stephens, trustee, and the claim for the repayment of such money is one of the debts that this action is brought to enforce.

The contracts themselves between Gisborn and Hussy and between Hussy and Stephens are inconsistant with the idea of a sale to Stephens. The agreement of Stephens of May 30th, 1874, to transfer to Hussy one-half of the property after the repayment of the debts or claims referred to says that the deed was in consideration of "certain moneys advanced and services rendered to me in effecting the purchase of two-thirds of the Mono mining claim and lode from my late co-tenants." The transfer of that half interest ther-for- to Hussy and by Hussy to Stephens had no connection whatever with the transactions between Gisborn and the trustee prior to or simultaneous with the declaration of trust. It was simply an agreement of Gisborn's to convey to Hussy in consideration of Hussy's services in negotiating the trade.

Whatever Hussy might do thereafter with the interests acquired was a matter of Hussy's own choice, and was immaterial to Gisborn. It had no bearing upon the disposition of the property as directed in the declaration of trust. The transfor by Hussy was not in pursuance of any agreement between Hussy and Gisborn, and Gisborn could not control Hussy in the matter of his disposing of his interests.

165 The agreement between Gisborn and Hussy took place on the 30th of May, 1874—the same day on which the declaration of trust was made—but *w*he brief of the appellant says (and the proof is to the same effect) that the declaration of trust was the "final act." The agreement between Gisborn and Hussy refers to the declaration as being already executed and delivered to Gisborn. This agreement, then, was subsequent to the "final act," and was no part of that transaction and in no way connected with it. It further appears that the transfer of this half interest by Hussy to Stephens did not take place for several months after the *e*xecution and delivery of the declaration of trust and of the agreement between Gisborn and Hussy. It therefor- could not have had any bearing upon any of the transactions of the 30th of May, but was subsequent thereto and independent thereof. Moreover, it was not a transaction to which Gisborn was a party. If ever a sale was contemplated to Stephens it was when the two deeds absolute on their face were made by Gisborn to him; but if the idea did then exist in their minds it seems to us that it was entirely removed or obliterated by the declaration of trust, and that we are bound by the declaration of trust; and it clearly shows that there was no purchase nor intended purchase of any part of the mine by Stephens or by those he represented, but that the money was loaned to Gisborn on the strength of the security given by the conveyance of the mine, as stated in the declaration of trust.

The question now arises whether the four hundred thousand dollars and the other moneys referred to in the declaration of trust were claims against the mines itself or whether they were claims to be satisfied only out of the "rents, issues, and profits" of the mine.

166 The declaration of trust, referring to the two deeds of conveyance by Gisborn to Stephens, trustee, says that "such conveyance was made and received upon the trusts, nevertheless, and to and for the uses, interests, securities, and purposes hereinafter limited, specified, described, and declared—that is to say, upon trust to receive the rents, issues, and profits of said premises and to apply the same as received as follows, viz., etc.

167 Then followed, in the declaration of trust, the requirement to pay, first, the expenses of operating the mine, &c.; second, to pay the four hundred thousand dollars back to Stephens, trustee; third, to pay Gisborn a percentage of one-third of the net proceeds of the mine, &c., and, fourth, to pay Gisborn two hundred and seventy-five thousand dollars.

The appellant urges that the for-going provisions for the trustee to receive the "rents, issues, and profits" of the mine requires these various amounts to be paid out of the product—the ores—of the mine, and is a prohibition upon the taking of the mine itself to pay them.

This is not a case where the court is asked to make a new contract for the parties, but to give an interpretation and enforcement of a contract already made. The court is asked to declare that the contract made creates a lien upon the land itself. The mine had ceased to produce ore, and resort to a sale of the property itself was neces-

sary unless the trust had ceased and all the property subject to a lien had been exhausted. It is not contended that the contract as made does not embody the agreement of the parties. Neither side says that anything was intended other than what the contract says; but appellant contends that the court below gave a wrong interpretation of that contract, and that it was never intended that the property itself was to be subject to the liens mentioned or to be sold to satisfy them, and that the contract conveys no such idea or authority. It being admitted that the contract embodies the agreement of the parties, we must look to the contract itself to learn its meaning. Primarily, no doubt, the indebtedness was to have been
168 paid out of the ores taken from the mine; but when the mine ceased to be productive this mode of paying the indebtedness failed. If the creditors could resort only to the "rents, issues, and profits," and this meant only the ores and they had ceased, the creditors had exhausted all their security. The meaning of the words "rents, issues, and profits" has often been before the courts, and by a long line of decisions the courts of chancery have declared that unless these words be connected with other words which restrain the meaning of the terms to the rents, issues, and profits as they arise (as if the trust is to pay debts out of the annual rents, &c.) the courts will give the words a meaning broad enough to include the sale of the property itself. The strict meaning of the words, as opposed to land, is the annual rents, issues, and profits; yet the courts hold that they should not be confined thereto, but should be taken in a more enlarged sense, to include every mode by which land may be made to yield profits out of which money so charged upon it may be taken, and consequently to include the sale of the property itself. The doctrine is thus laid down broadly by Judge Story in his work on equity jurisprudence. It is likewise laid down in Perry on Trusts, in Hawkins on Wills, Powell on Mortgages, and in other works, citing an array of authorities. 2 Storey's Eq. Jur., sec. 1064 & 1064*a*; 1 Powell on Mortg., 60–80; Hawkins on Wills, 120 *et seq.*; New *vs.* Nichol, 73 N. Y., 130 & 131; 2 Perry on Trusts, p. 168, sec. 602*g*; 2 Perry on Trusts, p. 170, sec. 602; K. & P., 410, sec. 764; Fletcher on Estates of Trustees, p. 56 *et seq.*

In the declaration of trust there was no such restraining words as the books seem to require in order to confine the meaning of the words "rents, issues, and profits" to annual rents, issues, and
169 profits. The title to the mine is held by the trustee, and the trustee declares, in the declaration of trust referred to, that he holds it in trust to receive and pay out the "rents, issues, and profits." Under the authorities therefor, as we have seen, he holds it to pay the indebtedness, not only out of the products of the mine, but also out of the sale of the property itself. We cannot avoid this conclusion, and this is a reasonable, just, and equitable conclusion, as the money was furnished mainly to buy the title for Gisborn, and the title ought to be held to pay it back. We do not think that a fair construction of the whole transaction shows that the parties ever intended to confine the security for the repayment of the money solely to the products of the mine. They do not say so. Had such

been the intention it is reasonable to suppose that some words conveying that idea would have been inserted in the declaration of trust. The deeds of Gisborn to Stephens, trustee, convey the title, and convey it as security. If the sole security was to be the ores there could have been no necessity for the conveyance of the title. A simple lease for the purpose of working the mine and paying off the debts would have been sufficient. It does not seem reasonable to suppose that it was intended that when the party loaning the money had the title that he was merely to hold the mine and make the money out of the ores, and, in case there were no ores, he was yet to reconvey the title and lose all he had loaned upon the security given by the deeds. If such had been the intention it should have been expressly stated. The court cannot infer it. If we look solely to the naked equity of the case we do not see that the position of the appellant can be maintained. A party loans money to buy property for another and takes a conveyance of the title in trust to secure him, but is required to apply the first
170 products of the property to repay the loan, and then to reconvey the title to the grantor. The lender is to hold the title and to pay himself out of the products of the property. It turns out that there are no products. Does equity require that he shall give up the title which was conveyed to him as security and which his money bought for the grantor? This would give the grantor the whole property, when two-thirds of it were bought for him by the money of the creditor and the creditor could get nothing. We do not think there is any equity in such a course, and a court of equity could not uphold it. If the appellant had come into court and laid claim to only one-third of the mine, looking at the naked equity of the matter, there might have been some equity in this claim.

171 It is further contended that if the indebtedness of four hundred thousand dollars or the expense account of some fifty-two thousand dollars ever existed as charges against the mine they have both long since been barred by the statute of limitation, which requires action thereon to be begun in four years. No time is mentioned within which any of the indebtedness was to be paid. The declaration simply says that the indebtedness was to be paid out of the "rents, issues, and profits." In the brief of the appellant it is said that "if suit can be maintained to foreclose his interest now, it could have been maintained the next morning after the papers were signed." The question arises, then, whether suit could have been maintained the next morning after the papers were signed. There was no ore on hand and no time to get any out. The whole terms of the declaration show that the indebtedness was to be paid only when time had been given to get out the ores and sell them, and it would be absurd to say that was to be done the next morning after the papers were signed; yet that would have to be said if it be true that the suit could have been begun the next morning after the papers were signed. Is the converse of the proposition true? If suit could not have been maintained the next morning after the papers were signed, does it follow that it could not be maintained now?

It is a general rule, no doubt, that where no time for payment is specified the debt is due immediately and the statute of limitations begins to run immediately. No time is fixed in the declaration of trust for the payment of any of the indebtedness, and, if the rule be applicable, all of the indebtedness fell due upon its creation; but the tenor of the declaration of trusts is against the application of the rule to any of this indebtedness. The declaration of trust
172 provided for the payment of the claims out of the "rents, issues, and profits," and further provided for obtaining of these "rents, issues, and profits" primarily by working the mine. If all of the four hundred thousand dollars could have been taken out within a few hours there would have been no necessity for going to New York to borrow it nor spending many days in negotiation. It is clear that many months were expected to be used up in gathering out these "rents, issues, and profits." The indebtedness, therefore, was not due immediately, and the statute of limitations did not begin to run immediately.

It is a rule in regard to the statute of limitation, applicable in all cases, that the statute begins to run when the debt is due and an action can be instituted upon it. The indebtedness in the present case did not, as we have seen, begin to run immediately, and the inquiry arises, When did it begin to run? The trustee does not set up the statute of limitations, nor does he claim to have disavowed the trust nor to have held adversely; nor does it appear that he has ever disavowed the trust or held the title adversely. We doubt whether one of the *cestuis que trust.* can do these things for him; but assuming that he can, then, as there is no disavowal of the trust by the trustee or any showing of his holding adversely, the rule is that the statute of limitations does not begin to run until the trust is closed. Bacon *vs.* Rives, 106 U. S., 99.

The trust in this case has not been closed. We do not think it a sufficient answer to this to say that the trust could not be carried out; that the ore failed and the trustees ceased working by reason of lack of money to pay the expenses. That is not the meaning of the word "closed" when applied to trusts. The trust cannot be closed until the work is accomplished. To say that the trust has run its course *as* is completed because there are no "rents,
173 issues, and profits" is simply to say that the trust is accomplished because it could not be accomplished. The authority of the books is that the statute does not begin to run until the trust work is fully completed. So long as the trust exists the statute cannot run. It cannot be said that the trust in this instance has been accomplished. The whole of the evidence shows that it was not done and all efforts in that direction ceased at the very threshold of the business by the loss of the ore vein and the lack of funds to further prosecute the work, the declaration of trust having made no provision to meet the extraordinary contingency which had arisen. The authorities produced are to the effect that generally when a trust upon real estate has been completed the property reverts. When the trust is completed, has accomplished its work, then its course *made* be said to have been run and after that period

the trustees have no duties in regard thereto to perform. They would then have ceased and the statute begin to run. The trust held by the trustee after his work is finished is a dry trust and it is his duty to convey the estate to the beneficial owner. This rule is expressly recognized in the declaration of trust, which provides that the property shall pass by conveyance from the trustee back to Gisborn after the expenses of working the mine and after the four hundred thousand dollars are paid to Stephens and after two hundred and seventy-five thousand dollars shall have been paid to Gisborn; but neither the language of the declaration of trust nor the general rule referred to gives to Gisborn a right to the property before all these things are done, before all these sums are paid. At this point, then, when these sums should all be paid, his rights would begin according to the terms of the declaration of trust; but that time has never arrived.

The trust in this case is an express one. It is declared by
174 parties in the declaration of trust.

1 Perry on Trusts, 24.

Laws of Utah, 1884, p. 192, sec. 226.

The trust was also intended to continue indefinitely. It is a continuing trust. In such cases the statute of limitation does not apply.

2 Perry's Trusts, sec. 863 & notes.

Oliver *vs.* Pike, 3 How., 411.

Angell on Lim., sec. 166 & 468.

Kane *vs.* Bloodgood, 7 Johns. Ch., 90.

Seymour *vs.* Freer, 8 Wall., 218.

Such trusts are not cognizable in an action at law, but fall within the proper, peculiar, and exclusive jurisdiction of courts of chancery. An accounting was necessary to ascertain the receipts and disbursements and liabilities of the trustees, and also to ascertain the relative priorities of the claims.

The indebtedness of four hundred thousand dollars is a charge and lien upon the mine. The title was expressly conveyed for its security. The fact that the declaration of trust provided such indebtedness to be paid primarily out of the products of the mine does not effect the question, for we have seen that the words "rents, issues, and profits," although primarily meaning the products of the mine, yet in a broader sense include the mine itself. Aside from this fact the four hundred thousand dollars were purchase-money—were furnished by Allen, Stephens and Co. to Gisborn—to enable Gisborn to make the purchase of the two-thirds of the mine in his own name. It is not necessary that such lien should be confined to vendors. The party furnishing the money to the purchaser is entitled to the lien in the same manner as a vendor.

2 Devlin on Deeds, 1150, and a vast number of cases there cited.

Barroilhet *vs.* Anspacher, 8 Pac. R., 804.

Motherwell *vs.* Taylor, 10 Pac. R., 304.

2 Leading Cases in Eq., 712–'3.

H. & W.'s Notes, 3 Am. ed.

175 The expense accounts are also a lien upon the realty. These claims were necessarily incurred in endeavoring to secure the object of the trust. They were not incurred for the trustee's gain, but in a fair effort to carry out the trust. They were just charges upon the trust property.

2 Pom. Eq., sec. 1085 *et seq.*
2 Perry's Trusts, sec. 485, 486, 618, 907.
2 Perry's Trusts, sec. 610.
Davis' Pet., 14 Allen, 24.

And this would be true even if in the trust they were no provisions for expenses.

2 Perry's Trusts, sec. 910, 913.

The respondent by assigment takes the place of the assignor, and, as the statute of limitations could not barr the claims in the hands of the assignors, it cannot barr them in the hands of the assignee.

It is objected that the respondent was allowed to prove for whom the trustee was acting and who furnished the money. This objection is based upon the ground that to make such proof is to add to the written contract in trust, and that the evidence is likewise immaterial. It is claimed that the written trusts speak for itself. We do not think that such evidence added any new provisions to the declaration of trusts. It simply explained what did not appear on the face of the declaration of trust, but which the language of the declaration indicated to exist. Parol evidence was admissible to show these things.

Railroad Co. *vs.* Durant, 95 U. S., 576.

It is likewise objected that respondent was allowed to introduce in evidence the written assignment by Allen, Stephens & Co. to respondent of their claims and demands. The ground of the objection was that Allen, Stephens & Co. had no power to assign the trust or to transfer the execution of the trust to any other party.

176 The objection is untenable. The evidence does not show any assignment of the trust or of the execution of it. Allen, Stephens and Co. owned some of the claims and demands, and these they had a right to assign and did assign. The assignment of these claims and demands was not an assignment of the trust. There was no assignment of the trust.

It is said that Gisborn made some advances towards working the mine, and, as this action was in part for an accounting, that these advances should have been allowed. These claims of Gisborn were not set up in his pleadings, but, on the contrary, he contended against the validity of any liens or charges against the trusts, property, or mine. The accounting called for was that of the trustee. If Gisborn paid any accounts for expenses he should have presented them to the trustee. The trustee was the only proper party to keep the account of the expenses.

The refusal of the district court to grant a continuance on the application of Gisborn is assigned for error. The refusing or granting a continuance is a matter very much in the sound discretion of

the court. Unless we can see that that discretion was abused, we cannot be justified in reversing the case on the ground of such refusal. In the present instance the deposition of Stephens was taken and, having been returned to the court, was published on the 20th of November, 1885. The appellant did not call at the clerk's office to see it or to see if it had been returned until the 1st of May, 1886. It was then not in the office, and, supposing it to be in the hands of counsel for the respondent, appellant waited until the tenth of May, when it was obtained from such counsel.

177 Upon examination of the deposition it became evident to appellant that he would need the deposition of Warren Hussy, and it would take about three weeks to get it; the trial was set for the 12th of May, 1886. Had he procured an examination of the Stephens deposition when he first went after it he would not, according to his own showing, have had time in which to take Hussy's deposition before the trial. We do not think that the appellant showed diligence and the district court did not err in refusing to grant a continuance.

We do not think that there was any error in the failure of the decree to state that Gisborn was entitled to redeem. That is a matter which is regulated by the statute, and it is not necessary that it should be stated in the decree.

Finding no error in the record, the judgment of the lower court is affirmed.

Zane, C. J., concurs.

Henderson, A. J., concurs.

178 In the Supreme Court of Utah Territory.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONN., Pl'ff & Respondent,

vs.

WILLIAM A. STEVENS, as Trustee; MATHEW T. GISBORN, ALLEN, Stevens & Co., William A. Stevens, Herman Blennerhassett, B. F. Allen, Hoyt Sherman, as Assignee in Bankruptcy of B. F. Allen, Bankrupt, and Warren Hussey, Defendants; Matthew T. Gisborn, Defendant and Appellant.

Bond upon Appeal of Matthew T. Gisborn, Defendant and Sole Appellant.

Know all men by these presents that we, Arthur Brown and Edward B. Critchlow, both of the city and county of Salt Lake, Utah Territory, are held and firmly bound unto the Charter Oak Life Insurance Company of Hartford, Connecticut, a corporation, in the sum of three hundred (300) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighteenth day of October, A. D. 1887.

Whereas lately, at the June term of the supreme court for the

Territory of Utah, in a cause pending in said court between the Charter Oak Life Insurance Company of Hartford, Con-
179 necticut, and William A. Stevens, as trustee, Matthew T. Gisborn and others, wherein said Charter Oak Life Insurance Company was plaintiff and respondent and the said Matthew T. Gisborn was one of the defendants and the sole appellant, judgment was rendered against the said defendant and appellant, Matthew T. Gisborn, affirming the judgment of the district court of the third judicial district of Utah Territory, and the said appellant has since, to wit, on the seventeenth day of October, 1887, in open court, in the supreme court for Utah Territory, counsel for respondent being present, obtained the allowance of an appeal from the said judgment of affirmance to the Supreme Court of the United States:

Now, the condition of the above obligation is such that if the said appellant shall prosecute the said appeal to effect and shall answer all damages and costs in case he fail to make his appeal good, then this obligation to be void; otherwise to be and remain in full force and effect.

ARTHUR BROWN, [SEAL.]
EDWARD B. CRITCHLOW. [SEAL.]

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Arthur Brown and Edward B. Critchlow, being first duly sworn, each for himself, upon oath, says: I am a resident freeholder within the Territory of Utah and am worth the sum specified in the
180 foregoing bond as the penalty thereof over and above my just debts and exclusive of property exempt from execution.

ARTHUR BROWN.
EDWARD B. CRITCHLOW.

Subscribed and sworn to before me this 19th day of October, A. D. 1887.

[S'L.] E. T. SPRAGUE,
Clerk Sup. Court.

The foregoing bond is by me approved, in open court and in the presence of counsel for respondent, this 19th day of October, 1887.

C. S. ZANE,
Chief Justice Utah T'y.

Endorsed: In the supreme court, Utah T'y. The Charter Oak Life Ins. Company of Hartford, Conn., pl'ff & respondent, *vs.* Matthew T. Gisborn *et al.*, def'ts & appellant. Bond on appeal to Sup. C't of U. S. Approved in open court and filed Oct. 20, 1887. E. T. Sprague, clerk.

181 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of an appeal allowed by said court in the cause

of The Charter Oak Life Insurance Company, respondent, against Matthew T. Gisborn, impleaded with others, appellant, do return, annexed hereto, a transcript of the record and proceedings, opinion and bond on appeal, all of and in said court and cause, to the Supreme Court of the United States, and I hereby certify that said annexed transcript of said record, proceedings, opinion, and bond is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and the seal of said supreme court of Utah Territory this 6th day of January, A. D. 1888, at Salt Lake City.

Seal United States of America, Supreme Court, Territory of Utah.

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Case No. 13,118. Utah Territory supreme court. No. 115. Matthew T. Gisborn, appellant, *vs.* The Charter Oak Life Insurance Company of Hartford, Connecticut. Filed September 24, 1888.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 115.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,

Plaintiff and Respondent,

vs.

MATTHEW T. GISBORN, Appellant; impleaded with WILLIAM A. STEPHENS, ET AL.

BRIEF OF COUNSEL FOR APPELLANT.

ARTHUR BROWN,
LYTTLETON PRICE,
For Defendant, Gisborn.

Star Print, 48 W. Second South St.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 115.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
Plaintiff and Respondent,
vs.
MATTHEW T. GISBORN, Appellant; impleaded with WILLIAM A. STEPHENS, ET AL.

Brief of Counsel for Appellant.

STATEMENT OF FACTS.

In the spring of 1874, Gisborn, the appellant, was the owner of an undivided one-third of the Mono mine, a property situate in Tooele County, Utah. He secured a bond or option to purchase the other two-thirds from the owners Embody, Heaton

and Miller. With this title to the one-third and a bond on the other two-thirds he went to New York and saw defendant William A. Stephens. A negotiation was entered into there between those two parties with regard to Mr. Stephens furnishing the money to pay the owners of the two-thirds the amount required by the option, to-wit: $400,000.00, but it was not completed in New York. One hundred thousand dollars was advanced by Stephens, and to secure it, Mr. Gisborn made a deed of ten-eighteenths of the mine, that is his own six-eighteenths, and four-eighteenths more which were paid for by the $100,000.00. He also executed at that time, in addition to the deed for the ten-eighteenths, four promissory notes for the sum of $100,000.00. (See record page 5, folio 19.) However, the transaction was left incomplete and was not considered closed by the parties, as Mr. Stephens testifies (record Intr. 29, page 100, folio 32). Gisborn was sick and could not transact business in New York, and Stephens desired to see the mine before closing the negotiation. So Stephens and one Warren Hussey, who was acting as promoter in the negotiation, went together from New York to Salt Lake and afterwards the appellant Gisborn met them there. The result of the further negotiation was that Stephens, having seen the mine, and being entirely satisfied with it, advanced the other $300,000.00 to take up the option. He took a deed for the remaining eight-eighteenths from Gisborn. These deeds were absolute in form

—two warranty deeds (Ex. "B" and "C," attached to the complaint, and referred to through the record, pages 22-27). As a part of the same transaction Gisborn also executed a contract to convey one-half of the mine to Warren Hussey when the said mine should be paid for. That was also transferred, although by a date a little later, to the same William A. Sthphens (record pages 108-9). Previous to this Mr. Gisborn had executed an agreement to give Hussey four-eighteenths of the mine, and one-half of that was transferred to Allen, Stephens & Co., a firm of which Mr. Stephens was a member (record page 103, folio 335).

At the same time of the execution of the last warranty deed, and stated to be part of the same negotiation which was commenced in New York and ended at Salt Lake on the 30th day of April, 1874, Stephens executed back to Gisborn a contract or declaration of trust, stating the terms and conditions upon which these deeds and other documents were held by him (that declaration of trust is found on record pages 27 to 30), and inasmuch as the questions arising here are largely as to the declaration of trust I quote the terms of it from folios 108 to and including a part of folio 211:

"Now as a part of the same transaction, I, the said William A. Stephens, trustee as aforesaid, do declare that such conveyance was made and received upon the trusts, nevertheless, and to and for the uses, interests, securities and purposes hereinafter

limited, specified, described and declared, that is to say, upon trust to receive the issues, rents and profits of the said premises, and to apply the same as received as follows, viz:

First.—To the payment of all expenses of operating said mine, keeping the same with the appurtenances in good condition and repair, transportation of ores, etc., from and after the 30th day of April, 1874, including expenses for the hoisting works on said premises, and current public taxes."

Second.—To the payment to me as trustee of the sum of four hundred thousand dollars (400,000) advanced by me as trustee to said Gisborn, for the purchase of two-thirds, undivided, of said premises from his late co-tenants, together with interest at the rate of seven (7) per cent. per annum, as follows: On $100,000 thereof, from and after the said 30th day of April, 1874, and on the remaining $300,000 from and after the 30th day of May, 1874.

Third.—To the payment to said Matthew T. Gisborn, of a sum equal to seven per cent. perannum, upon one-third of the net proceeds of said mine, so applied to the payment of said sum of $400,000, and interest as aforesaid, from and after the same shall be so applied, or a like percentage per annum on such portion of one-third of the net proceeds of said property, as said Gisborn shall not have received in the meantime with my consent.

Fourth—And finally to deliver and pay over to said Gisborn, his heirs or assigns, the sum of two hundred and seventy-five thousand (275,000) dollars, less the amount of net proceedings he may have received as

last aforesaid, but exclusive of the interest mentioned last above in subdivision third.

"And I, the said William A. Stephens trustee, as aforesaid, do covenant and agree to, and with the said Matthew T. Gisborn, his heirs and assigns, that I shall and will duly apply all the rents, issues and profits of said property to the uses aforesaid, in the order aforesaid, and as soon as the same shall be received by me, and further, that as soon as said uses shall be fulfilled and discharged, I will cause said conveyance of said premises to me to be canceled of record, by doing such acts, and executing such instrument as may be necessary to recover or revert the title of said premises, with the tenements, hereditaments and appurtenances thereto appertaining to and in the said Matthew T. Gisborn, his heirs and assigns, to the same extent and estate, as now held by me, as aforesaid as trustee."

After the execution of these various documents Mr. Stephens as trustee went into possession, worked the mine for a period, and it shortly became unprofitable. The vein, which having theretofore appeared to be immensly rich and yielding millions, was found to be faulted and was cut off by a throw of the ground as smooth as if cut with a knife. He had taken out about $20,000.00, and continued the work of exploration, but without success, the continuation of the vein from that day to this never having been discovered. In the process of exploring for the vein Mr. Stephens did not furnish the money, but he made various contracts with other persons and run in debt. Those indebtedness were

afterwards placed in the form of an account stated, and are summarized in the 17th finding of fact (page 73), the total amount stated for expenses in running the mine being $51,796.30, which was incurred in the years 1875 and 1876, and the accounts were stated in 1877.

These accounts stated have since been assigned to the plaintiff. The money advanced by Stephens in the original instance was claimed and is stated on oral testimony to have been advanced by the firm of which he was a member, Allen, Stephens & Co. of New York, who assigned their claim for the money thus advanced to the plaintiffs on the 12th day of February, 1875.

In November, 1877, Mr. Stephens ceased to exercise any further control over the management of the mine, and has not been in possession since, although afterwards he executed a lease to certain parties to give them the privilege of searching for the lost vein, which they never found, the last date of the lease being January 1st, 1879.

On this state of facts the plaintiff brings an action, filing the complaint on the 21st day of August, 1883, in the Third Judicial District Court of Utah, having jurisdiction of the county where the said premises are situated. In the complaint the plaintiff alleges the deeds as heretofore stated, setting them out as an exhibit to the complaint; alleging also the declaration of trust, setting it out in *haec verba* as an exhibit to the complaint; alleging that the firm of

Allen, Stephens & Co., through their agent Stephens, first advanced the $100,000 in New York, and afterwards the $300,000 in Salt Lake; and alleging that the said deeds were given to secure the payment of the said money, substantially claiming that it was a loan from Allen, Stephens & Co. to the defendant Gisborn; also alleging the assignment of said claim to the plaintiff February 12, 1875; alleging also the indebtedness incurred by Stephens in operating the mine, the accounts stated, and the assignment of the accounts stated separately to the plaintiff, stating that no part of this indebtedness is paid, aggregating it, and asking for a decree of foreclosure against the entire property and the entire title of the property to satisfy the said claims.

To this the defendant at first demurred, the demurrer was overruled, and then answered. The defendant in his first answer set up, among other things, the statute of limitations. On motion of the plaintiff the defense of the statute of limitations was stricken out. The defense was set up to each item of the claim of indebtedness set forth in the complaint, and in each instance where set up it was stricken out on motion. Record pp. 57-62.

The correctness of this ruling in striking out the defense of the statute of limitations, is one of the questions involved, and the other questions involved are as to the construction of this declaration of trust between the parties, plaintiff claiming the entire transaction was a mortgage of the whole estate,

and the defendant claiming that at best it only referred to the *rents, issues and profits,* and that there was no authority to sell the entire title of the mine; the plaintiff also claiming that the moneys advanced by Allen, Stephens & Co. and assigned to plaintiff, are in the nature of an indebtedness for which a recovery may be had at least against the property, defendant claiming that the entire transaction was in the nature of a plan by which the title was to be obtained from the former owners of the two-thirds and transferred to Stephens.

The question also arises as to the right to introduce parole evidence to explain the documents. Parole evidence was introduced at length by the plaintiffs and objected to by the defendants.

ASSIGNMENT OF ERRORS.

First.

The court erred in striking out from the answer the defence of the statute of limitations plead, 1st, to the four promissory notes; 2d, to the claim for $300,000.00; 3d, to the various accounts stated set up in the complaint. The court erred in each of the rulings on said subject, and in each part of the answer struck out we assign error, all relating to the same subject (record pages 58 to 62).

SECOND.

The court erred in its construction of the contract as shown in the third finding of fact. Instead of showing that Gisborn solicited and obtained a loan from the said Stephens, trustee, of $400,000, the contract indicates, and the other evidence shows that Stephens did not loan the money to Gisborn as a loan but advanced it for his own purposes to enable him to purchase an interest in the property, and through him advanced the money for the purchase of the property from Gisborn's co-tenants, and the finding that Gisborn did with the said $400,000 pay for said interest is contrary to the evidence of Stephens himself, which shows that he had a contract for and was an owner of one-half of the mine, and the payment of the $300,000, was at Stephens' own motion, and for the purpose of buying the claim of the co-owners, and not for the purpose of loaning the money to Gisborn.

The entire construction of the second and third findings is that the relation of debtor and creditor existed, when in truth the whole scheme was one by which Stephens himself was to be the owner of the property.

THIRD.

The court erred in its holding in the fourth finding of fact, and thereby misconstrued the contract. The contract shows that Stephens was trustee for Gisborn and for no other person, and the finding "that said Stephens, trustee in said transactions with said Gisborn, and in arranging and fixing the terms of said loan, and in making said loan of $400,000, to said Gisborn, was acting as trustee for and was trustee for said Allen, Stephens & Co." was contrary to the written agreement and the other evidence in

the case. That the negotiations between the parties are not confined to three "certain writings," but there were other writings executed about the same time, which should be construed with the three "certain writings" which are not annexed to the complaint, but which are found annexed to the deposition of William A. Stephens and are found in the statement.

The statement that "said Stephens as trustee, acquired the legal title to all that certain real estate" described in the complaint is not justified by the contracts for the reason, that it appears at the time of receiving the deeds to the real estate he alse executed back the declaration of trust, and the papers executed at that time show that he did not acquire the legal title to the real estate, but only the right to take the rents, issues and profits thereof.

FOURTH.

The seventh finding of fact is unsupported in this, that it does not in any way appear that the Mono Mining Company was authorized to contract debts against the property, or that Stephens and Gisborn were co-partners, or that Stephens was justified in incurring indebtedness upon the mine in any sum whatsoever. No evidence tends to show any negotiation or conversation or contract authorizing him to incur debts on the faith of the property. The finding is erroneous also for that it appears that each and all of said debts were outlawed and barred at the time of the commencement of this suit, and there is nothing in the contracts that authorize the court to add amount of the said various claims to the moneys advanced, and to charge it as a lien upon the property.

FIFTH.

The court erred in the eleventh finding of fact, because no authority for executing the assignment was shown. There was no loan; and as there was no loan from Stephens to Gisborn, none could be assigned.

SIXTH.

The evidence is insufficient to justify the twelfth finding, "That said Gisborn has not advanced any money to said trustee, in the execution of said trust, or any money chargeable in this action upon said trust estate," for the reason that the evidence of Gisborn, which was entirely uncontradicted, was that he had at one time furnished $5,000; and at another time six or seven hundred dollars. That, although, evidence was accessible to contradict this statement if not true, none was offered; and Gisborn was entitled to have the said $5000, placed with the other items claimed to be charged against the estate.

SEVENTH.

The fourteenth finding is unsupported by the evidence for the reason stated in specifications of the ninth finding. It is not true "that he has not at any time abandoned the trust," but in 1877 he wholly abandoned and neglected the duties thereof.

EIGHTH.

The evidence is insufficient to justify the fifteenth finding, "that it was the intention of said Gisborn and said Stephens in creating said trust, that if it became necessary to pay the indebtedness,

future and prospective profits should be realized by the sale of said real estate, the said mine and mining premises; that the words in said trust, 'the issues, rents and profits of the said premises,' in a court of equity, under the facts in this case, carries the right and power of the Court to order and decree a sale of said premises to satisfy the liens thereon," is without any basis whatsoever; the language of the written contract itself does not bear that interpretation; the prior negotiation and conversation between the parties, does not bear that interpretation. No word whatever is pretended to have been said by any witness, authorizing Stephens to sell the mine in case the rents, issues and profits should be insufficient; on the contrary, the evidence shows and the complaint alleges that both parties believed that the rents, issues and profits would be sufficient to pay all the sum of money provided for, and no contract was made on any other contingency, and the property was not placed in Stephens' hands for any other purpose than to use the rents, issues and profits. No evidence was offered on the subject, and the matter quoted should not be stated as a finding of fact.

The finding, "that said trustee is now entitled to the use of said property," is not justified by the evidence, for the reason that he had abandoned the use of the said property for a period so long that his right to it is now barred by the statute of limitations.

The finding, "that the said premises should be sold and the proceeds applied to paying off the liens in the order specified in said declaration of trust," is entirely unsupported by the evidence, and no witness testified and no written paper was given in evidence of any such arrangement or contract.

NINTH.

The court erred in the seventeenth finding of

fact, for the reason that it appears as a matter of law that each and all of the claims there mentioned were unauthorized, and were each and all barred by the statute of limitations.

TENTH.

The court erred in the eighteenth finding of fact, for the reason that it goes upon the theory that the contract between the parties was founded upon a loan from Stephens to Gisborn, when in truth that was not the arrangement or understanding of the parties at all.

ELEVENTH.

The court erred in overruling the objection of counsel for the defendant to the fourth interrogatory propounded to William A. Stephens, and in allowing his answer to be read as per the deposition, in which he states "I acted as trustee for Allen, Stephens & Co. in advancing said money to said Gisborn mentioned in said declaration of trust. They furnished me the money so advanced."

And also to the seventh interrogatory, which is substantially the same matter, and in allowing his answer to be read, in which he testifies "I acted as trustee for Allen, Stephens & Co."

TWELFTH.

The court erred in overruling the objection of counsel for the defendant to the admission of the four notes of $25,000 each, dated April 30th, 1874, signed by Warren Hussey and M. T. Gisborn, the said

notes appearing upon their face to have been barred by the statute of limitations, and were mutilated and altered on their face.

THIRTEENTH.

The court erred in admitting in evidence and overruling the objection of counsel for the defendant to the assignment by Allen, Stephens & Co. to the Charter Oak Life Insurance Co., for the reason that the said Allen, Stephens & Co. had no power to assign the trust or to transfer the execution of the trust to any other party.

FOURTEENTH.

The court erred in allowing the answer to the twenty-fifth interrogatory propounded to William A. Stephens to be read, and in overruling the objection of counsel for defendant thereto, for the reason that the items therein contained were not a proper charge against the defendant Gisborn; were not a proper charge against the mine, and the several items were barred by the statute of limitations.

FIFTEENTH.

The court erred in overruling the objection of counsel for the defendant to the answer to the twenty-ninth interrogatory to William A. Stephens and in allowing the witness to state the facts and circumstances under which he became trustee, and thereby to add to the written contract between the parties, and to change the effect thereof.

SIXTEENTH.

The court erred in overruling the objection of counsel for the defendant to the admission in evidence of the account stated between Wm. A. Stephens and Mrs. C. L. Torbitt, and in permitting plaintiff to prove the existence of a charge against the mine by virtue of an account stated between the parties aforesaid. The said account was a transaction between other parties, and was immaterial and irrelevant, and was barred by the statute of limitations of the Territory of Utah.

SEVENTEENTH.

The court erred in admitting in evidence the evidence of an account stated between Wm. A. Stephens, trustee, and George Clark, upon the 21st day of April, 1877, showing a balance due said Clark of $2227.37, for the reason that the same was immaterial and irrelevant, and was barred by the statute of limitations.

EIGHTEENTH.

In like manner the court erred in admitting in evidence the accounts stated between the said Wm. A. Stephens and the said Clark and other parties, aggregating in all the sum of $51,796.30

NINETEENTH.

The court erred in admitting in evidence the first lease from Stephens to Marshall, Royle & Clark, dated December 31st, 1877, and also the second lease from Stephens to Marshall, Royle & Clark, dated February 15th, 1879.

TWENTIETH.

The court erred in overruling and denying the motion for a non-suit made by counsel for defendant Gisborn.

TWENTY-FIRST.

The court erred in refusing to allow the witness Gisborn to state what conversation took place between himself and Hussey at the time of giving the deed of the 30th of April, 1877.

TWENTY-SECOND.

The court erred in refusing to admit in evidence the undertaking of Hussey to Gisborn, offered by counsel for Gisborn, and marked Z1.

TWENTY-THIRD.

The Court in erred in refusing to allow the witness Gisborn to answer the question: "Q. Was the $300,000 advanced on May 30th, 1874, on the security of the deed for the entire mine, or on the rents, issues and profits thereof?"

TWENTY-FOURTH.

The court erred in granting the motion of counsel for plaintiff to strike out the answer of witness Gisborn on cross-examination, being the answer to the question "They were to pay the other $300,000, and the deed was to go on record."

TWENTY-FIFTH.

The court erred as conclusions of law in finding that the indebtedness incurred by Stephens is a subsisting indebtedness against the property; that it amounts to $51,796.30; and in finding that the plaintiff is entitled to a first lien upon the premises to satisfy the said sum.

TWENTY-SIXTH.

The court erred in finding that the amount of $400,000 was an indebtedness or loan to Gisborn, and that it was a lien upon the property, and that the said plaintiff was entitled to foreclosure therefor.

TWENTY-SEVENTH.

The court erred in holding and finding as a conclusion of law, and in rendering a decree sudjecting the entire premises to a sale, and not merely that the same was a lien on the rents, issues and profits of the mine.

BRIEF AND ARGUMENT.

I.

STATUTE OF LIMITATIONS.

The theory of this complaint seems to be that Wm. A. Stephens was the trustee merely for the firm of Allen, Stephens & Co., and that they loaned

$400,000 to Gisborn upon the Mono property. The transaction in that way would be the simple one of debtor and creditor between Allen, Stephens & Co. and Gisborn, the debt from Gisborn to the firm being secured by a deed of trust which in this case would be tantamount to a mortgage to secure the indebtedness, and in that view of the situation any suit upon the said promissory notes would be barred under the Statute of Limitations of Utah in four years, as well as any suit of foreclosure of a mortgage or deed of trust to secure the same.

The Statute of Utah is as follows:

"§ 3141. s 192. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

"§ 3142. s. 193. Within five years:

1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

2. An action for the mense profits of real property.

§ 2143. s 194. Within four years:

An action upon any contract, obligation or liability founded upon an instrument of writing, except those mentioned in the preceding section."

This is the statute applicable to this class of actions and foreclosures generally. It has often been held that the statute applies equally as well to deeds

of trust as to mortgages wherever the relation of debtor and creditor exists, and that is all there is of the question here. No relationship of trustee and *cestei que trust* existed between Allen, Stephens & Co. and Gisborn; nor between the assignee of Allen, Stephens & Co., the plaintiff in this case, and Gisborn.

The declaration of trust is dated the 30th day of May, 1874; the assignment is dated the 12th day of February, 1875 (record page 86); the trustee, Wm. A. Stephens relinquished the management in November, 1877 (see his testimony at top of page 99, folio 323) in which he says:

"Active work of prospecting, etc., under same management continued until ordered by the Charter Oak Co. to be stopped on the first of November, 1877; active work then ceased. It ceased with me as trustee, because I had no funds in the trust with which to prosecute it, and could not raise any on the mine as trustee for the further work of exploring for the lost vein or ore body, the Charter Oak management declining to furnish any more funds. Since that time I have not been able to do any further work for want of funds, under my trust, beyond what was done in leasing the mine between January 1st, 1878, and June 10th, 1879."

The complaint was filed August 20th, 1883, nearly nine years after the date of the notes; more than eight years after the money was advanced; nearly six years after the work had ceased; more

than four years after the last lease, and more than four years after work ceased under the last lease, according to the testimony of Mr. Stephens.

The defendant Gisborn was a constant resident of this Territory during the entire interval, and no ground whatever is alleged in the complaint why the Statute of Limitations of the Territory of Utah does not apply. It was claimed on the argument below that the Statute of Limitations would not run, because the relation of trustee and *cestui que trust* existed between Gisborn an Stephens, but Stephens says he was trustee merely for Allen, Stephens & Co., and if, on the other hand, he was trustee for Gisborn as well, then the relationship of debtor and creditor did not exist, and this action could not be brought. The rule is broad and general that wherever the relation of debtor and creditor exists, under such circumstances that a suit at law can be maintained the statute of limitations will run, whether the relation of trustee and *cestui que trust* exist or not.

Hayward vs. Gunn, 82 Ills., 389.
Angell on Lim., 166.
Kane vs. Bloodgood, 7 John. Cha., 90.
Governor vs. Woodworth, 63 Ills., 254.

It was also claimed, technically, on the argument below, that the statute of limitations could not be applied to this case, because in the demurrer inter-

posed by the defendant Gisborn no mention was made of it, but the rule is different. Interposing a demurrer does not waive the right to plead the statute of limitations in the answer by way of defence. It may be first put in by answer although a demurrer has theretofore been interposed.

Bliss Code Pleading, 355.

II

During the period of the managment of Stephens supplies were furnished for mining operatons, constituting the special items set fourth in the complaint. These are so many different causes of action as alleged in the complaint, but in truth they were all connected as accounts stated, and all came to one thing. They were contracts, debts incurred by Stephens for managing or mismanaging the mine. They are tabulated in the 17th finding of fact, and the facts and law applicable to each one is applicable to all, and they should all be considered together; they constitute a sum total of $51,796.30.

These claims are founded upon the relationship of debtor and creditor, the creditor in the original instance being the pe son furnishing the goods, work, labor or other thing that constituted the basis of the account stated. Each one of them was a creditor to Stephens—Stephens the debtor. It is stated that Gisborn, the defendant, approved, and it is found in the facts, and perhaps proven in the evidence, that

he endorsed each of these accounts If so he would simply be a debtor to each creditor in the account stated. Each one of them was a claim. If in writing these accounts stated would be barred in four years under the statute of limitations above quoted. The mere proof of these claims did not entitle them to become liens upon this property. When, where and how could they become liens? Ask any one of those persons whose names are cited in that finding? he had no mortgage, no deed of trust, no writing on this property that could be enforced in his name, or in his interest. Stephens was the trustee. The plaintiff in this case bought the claims from Allen, Stephens & Co., but its so doing did not add to or increase their lien under the mortgage or the right to the property. Equity could not create these trusts, and a court would exceed its authority in adding to the original indebtedness by the amount of these various claims and accounts, whether they were assigned to the Charter Oak Life Insurance Company or to anybody else.

These two were barred by the Statute of Limitations; the date of the last one, and the date of all the accounts stated, I think, is in 1877 (see finding No. 7, page 69 of record), the dates ranging from April 21st, 1877, to November 19th, 1877, most of them more than six years before the commencement of this action, and all of them more than five years. Clearly these accounts were each and all barred by

the Statute of Limitations—barred in the hands of the original owner, they could stand in no better light in the hands of the plaintiff. These items not being a lien on the property in the hands of the original owners, they could not become such by being bought in by the Charter Oak Life Insurance Company; a lien could not be created by the assignment to the plaintiff.

New vs. Nicoll, 73 N. Y. 132.

Stephens never paid any of these claims; they were not moneys advanced by him for which he seeks to be reimbursed, and he has never assigned any claim for reimbursement to the Charter Oak Life Insurance Company. They were simply debts unsecured in any form or manner, and could not become secured by being purchased by the Charter Oak Life Insurance Company.

III.

If we examine carefully the nature of this transaction, it is apparent Gisborn never was indebted to either Stephens or the Charter Oak Life Insurance company in the sum of $400,000, or any other sum whatsoever; that the whole transaction constituted a purchase by Stephens and Hussey of an interest in this mining claim, in which they took their chances of success or failure; and, like any other person, neither they nor their assignees have any right or

or claim upon the property, except in pursuance of the articles under which they received the title. The transaction occupied several months in time; hence the papers which were executed at one time, as one part of the transaction, are not always consistent with those executed at a subsequent time. The Declaration of Trust was the final act, and all prior arrangements inconsistent with that Declaration merged into it. It appears that the discussion first commenced in New York City; that Mr. Gisborn was there sick, and the business was not concluded; that papers were temporarily drawn up, with the understanding and expectation that they would be taken up and merged in other papers. Hence it was that Gisborn deeded a part only of the interest in the first deed, and at the time of the advancement of the first $100,000, Gisborn gave his four notes for twenty-five thousand each. (Page 84.) It will be observed that these notes were due in two, three and four months, respectively, and read as if the simple relation of debtor and creditor existed between the parties, Stephens, trustee, on the one side, and Gisborn and Hussey on the other. Now the truth was, those notes neither represented promises to pay by Gisborn and Hussey on the one side, nor did they expect to pay anything when those notes were due; nor did Stephens, Allen & Co., or the other parties expect to receive anything. They were temporary documents to protect the parties until the final concluding of the arrangments should be made by more

solemn obligation. That more solemn obligation is to be found in the Declaration of Trust. In that declaration is provided that those notes should be paid—not in two, three and four months, but out of the "rents, issues and profits," after the expenses were paid, whenever that should be. If the "rents, issues and profits" were sufficient to warrant the payment of the amount of money represented by these notes within one month, all of them were then to be paid, irrespective of any latter date in the notes mentioned. If the "rents, issues and profits" were not sufficient to pay the notes in a thousand years, the principal sum was not payable for the thousand years. The $100,000 stood in no better position than the other $300,000, although the $100,000 was represented by these promissory notes, and the other $300,000 were not represented by any promissory notes. Both are alike on one footing by the terms of this Declaration of Trust and fall within the second head thereof. It will be observed that there is no limitation to time within which this Declaration of Trust is to be executed, and no time within which the defendant, Matthew T. Gisborn, is required to do anything, or pay anything from his own purse, or from any source whatsoever. Stephens was to be the trustee, to undertake the work of mining the Mono Mine. He did undertake the work for an ample consideration, to-wit: thirteen-eighteenths of this mine. He was to have all the time in the world to carry on this operation, or so much

as should be necessary. He was duly required to consistently and persistently continue the mining until out of the "rents, issues and profits," the amount of money should be taken specified in the various items of the Declaration of Trust. The whole authority conferred upon him was not to take the property and sell it, or to appeal to a court of chancery to give him additional power thus to sell under the jurisdiction of that court; but to obtain his money from the mining operation, and from that only. The separate ownership of Gisborn and Stephens is recognized throughout the whole of the contract.

The third trust reads: "To the payment to said Matthew T. Gisborn of a sum equal to seven per cent. upon one-third of the net proceeds of said mine, so applied, or a like percentage per annum on such portion of one-third of the net proceeds of said property as said Gisborn shall not have received in the meantime with my consent." What was the sense of this provision unless it was to recognize that Gisborn was all the time the owner of a third; Stephens and Hussey the purchasers of two-thirds? Gisborn was to have the interest on his third. That same theory is carried out in the next trust, which is to pay to Gisborn $275,000 in cash. That was to represent his third. It was a merciless and dishonest contract on the part of Stephens, to demand of Gisborn, his surety, that $400,000, which was the purchase money he was to put into the property, and for which he was receiving his title, should be paid first. Hon-

esty required that the $275,000 should be paid *pro rata* with the $400,000. But take the contract as it reads, his trust must be next fulfilled, the payment to Gisborn of $275,000, thus recognizing his one-third interest again.

All these trusts when read in the light of contemporaneous contracts, by which Stephens was to have the title to thirteen-eighteenths of the property, show that the relation of debtor and creditor, if it ever existed, was merged at the date of that declaration of trust, and at the time Stephens became the assignee of the Hussey contract; and that thereafter the relationship of debtor and creditor, in truth, did not exist, but that of co-owners. The whole scheme, up to that time, had been simply one of purchase.

The result was, Stephens and Hussey were the owners in equity of thirteen-eighteenths: Gisborn of the other five-eighteenths. The $400,000 was the advancement of purchase money of the thirteen-eighteenths: the $275,000 was the purchase money, afterwards to be paid to Gisborn. Stephens was the trustee of the title merely. He did hold the title in trust for the execution of this contract; he had no other authority over it. The only fund which could be used for the performance of that contract were the "rents, issues and profits," not the title: Stephens to hold the title, to enable him to control the "rents, issues and profits;" but only to hold it, not to sell it. It was argued (and it will be argued) that there is no distinction

between the "rents, issues and profits," and the title to the property; but, no matter by what logic, or what strength of reasoning, black can never be made white. We have but to look around us to see thousands of instances in which the title is one thing, and the "rents, issues and profits" very distinct. The "rents, issues and profits" may be worse than worthless, for years and years, yet the title be of value. Here Gisborn had carved out of this estate simply the "rents, issues and profits," and permitted Stephens to apply them. This court cannot obtain jurisdiction over anything else than "rents, issues and profits," not having been within the contract. It is not within the power of the court of chancery to increase the body of this trust, nor to add any estate not therein specified. A court of equity cannot create an equity to secure a lien, any more than it can create a contract. The attempt to take this title away from Gisborn by this procedure is an attempt to create a new contract. By the terms of the Declaration of Trust, in no event was the purpose to cause him to part with his title which he had in equity to his five-eighteenths. That was his forever. Neither is Stephens authorized by any papers signed by him to dispose of it, nor create a lien upon it, which would permit a court of euqity to sell it in satisfaction of that lien. Courts of equity cannot establish or create liens.

1 Pomeroy, Sections 130, 178.

Perkins vs. Parkins, 16 Mich., 162.
Bennett vs. Nichols, 12 Mich., 22.

The reason why it was limited to the rents, issues and profits, is fully explained by both Gisborn and Stephens. It was understood at the time that the rents, issues and profits, would be sufficient to pay all the sum of money; and it was perfectly satisfactory to both of them to take the money out of the rents, issues and profits. As alleged in the complaint, these "were believed to be of great value, and ample security for the money to be paid according to said Declaration of Trust." (See record page 7, folio 26.)

Gisborn is not in default- No duty required of him by any of the contracts has he failed to perform. It was not required that he should pay the money out of his own pocket; therefore, he has not failed because the money has not been paid. He has complied with the contract in every particular. If a suit can be maintained to foreclose his interest now, it could have been maintained the next morning after the papers were signed. Was that the intention? On the contrary, it is clear that in no event was Gisborn to be deprived of his title in the property. The fact is, as it is substantially alleged in the complaint, Stephens and Hussey went into a scheme to purchase, believing that the rents, issues and profits would be immense. By the accident and misfortune of that class of business, in a short time after the contract was made, that which had seemed rich held

nothing; but, instead of being a source of profit, it was a cause of expense. Stephens, and those who furnished money for him, The Charter Oak Life Inurrance Company, were losers. There was no way provided by which they could get back their money. As they say, they were remediless; not because the law failed to afford any remedy, but because they had made a losing bargain. "A freak of nature cheated them out of their vein," and having no remedy against nature, they now ask that Matthew T. Gisborn's property may be taken to pay them for their own misfortune. He is a loser equally with them, and no reason can be shown, either in equity or common sense, why his property should be taken to pay for their losses. If the plaintiff and those acting for him, had been good miners, had known which way to dig for the lost vein, they would have been remunerated, probably, and had their money back; and now they cannot charge the result of their ignorance to Gisborn. It is no fault of his.

New vs. Nicoll, 73 N. Y. 130.

IV.

Stephens takes the title of this property for the simple trust of holding the title to enable him to carry on the mining business. His duty required him to continuously mine until the whole of this fund was paid. It became, within a short period,

impossible, with his knowledge and his means, to execute the trust. After a few feeble efforts he abandoned, early in the year 1875, all attempts to carry on the further execution of his trust. Mining by him ceased. His subsequent leases to different persons were in violation of the articles of trust, and not in fulfillment of it. Having taken the title for the purpose of executing a trust, and failed and relinquished all attempts at it, the title reverted to the original grantor, as owner in equity, and this defendant is entitled to have the bill of complaint dismissed, and Stephens compelled to deed him to the title of his property.

Doe vs. Nichols, 1 B. & C., 336.
Stevens vs. Earles, 25 Mich., 43.

V.

The contract in this case, to-wit: the Declaration of Trust, is plain and has no latent ambiguity. While it is competent to introduce other contracts and writings made at the same date, and bearing on the same subject, it is not competent to prove by parole testimony what was said, and what was considered by the parties at the time.

And we insist upon our objections made at every stage of the case to the deposition of Mr. Stephens and the other evidence introduced, without representing them here. We refer and make

part of our brief all the objections as stated in the record.

Moran vs. Prather, 23 Wall., 499.
Long vs. Millerton, 2 Cent. Rep. 277; S. C. 101; N. Y. 638.
Warren vs. Wheeler, 8 Met., 97.
Oelrichs vs. Ford, 23 How., 63.
Crary vs. Campbell, 24 Cal., 636.
Donahue vs. McNulty, 24 Cal., 416.
Ward vs. McNaughton, 43 Cal., 159.
Proctor vs. Gilson, 49 N. H., 65.
Howe vs. Walker, 4 Gray, 318; S. C., 43; Am. Rep., 125, 380.
Stowell vs. Buswell, 135 Mass., 345.
N. J. Zinc Co. vs. Boston Co., 15 N. J., Eq., 488.
Long vs. N. Y. C. R. R Co., 50 N. Y., 70.
Johnson vs. Cranage, 45 Mich., 19.
Jacobs vs. Miller, 50 Mich., 126.
Winoa vs. Thompson, 24 Minn., 208.
Lloyd vs. Farrel, 48 Pa. St., 76.
Fruin vs. Crystal Ry. Co. (Mo.), 4 West. Rep., 606.
Kimball vs Brawner, 47 Mo., 398.

VI

In rendering the decree it did, the court proceeded upon the theory that moneys advanced toward the management of the mine were the first lien

upon the property, and the property was the fund from which these liens should be paid. Gisborn was entitled to any advances he made, as much as any other person interested in the transaction. The evidence was uncontradicted that he advanced fifty-six hundred dollars. (See Record, page 125.) If untrue, this could have been contradicted by McCornick and others. From the theory upon which the case was tried, this was an accounting. It was not necessary to plead each item of the account.

VII.

The arrangement between Stephens and Gisborn was a personal one. Stephens was to advance the money as trustee. and he was to hold the trustship, because he advanced the money. This personal obligation could not be assigned; neither could the contract be assigned in part and remain in Stephens in part.

Grosner vs. Atlantic, 17 N. Y., 391.
Hartford vs. Davenport, 37 Mich., 613.

The contract not being assignable, the Charter Oak Company acquired nothing by the pretended assignment from Allen, Stephens & Co.

ARTHUR BROWN,
LYTTLETON PRICE,
For Defendant, Gisborn.

Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1891.

TERM No. 115.

MATTHEW T. GISBORN, Appellant,

vs.

THE CHARTER OAK LIFE INSURANCE COMPANY

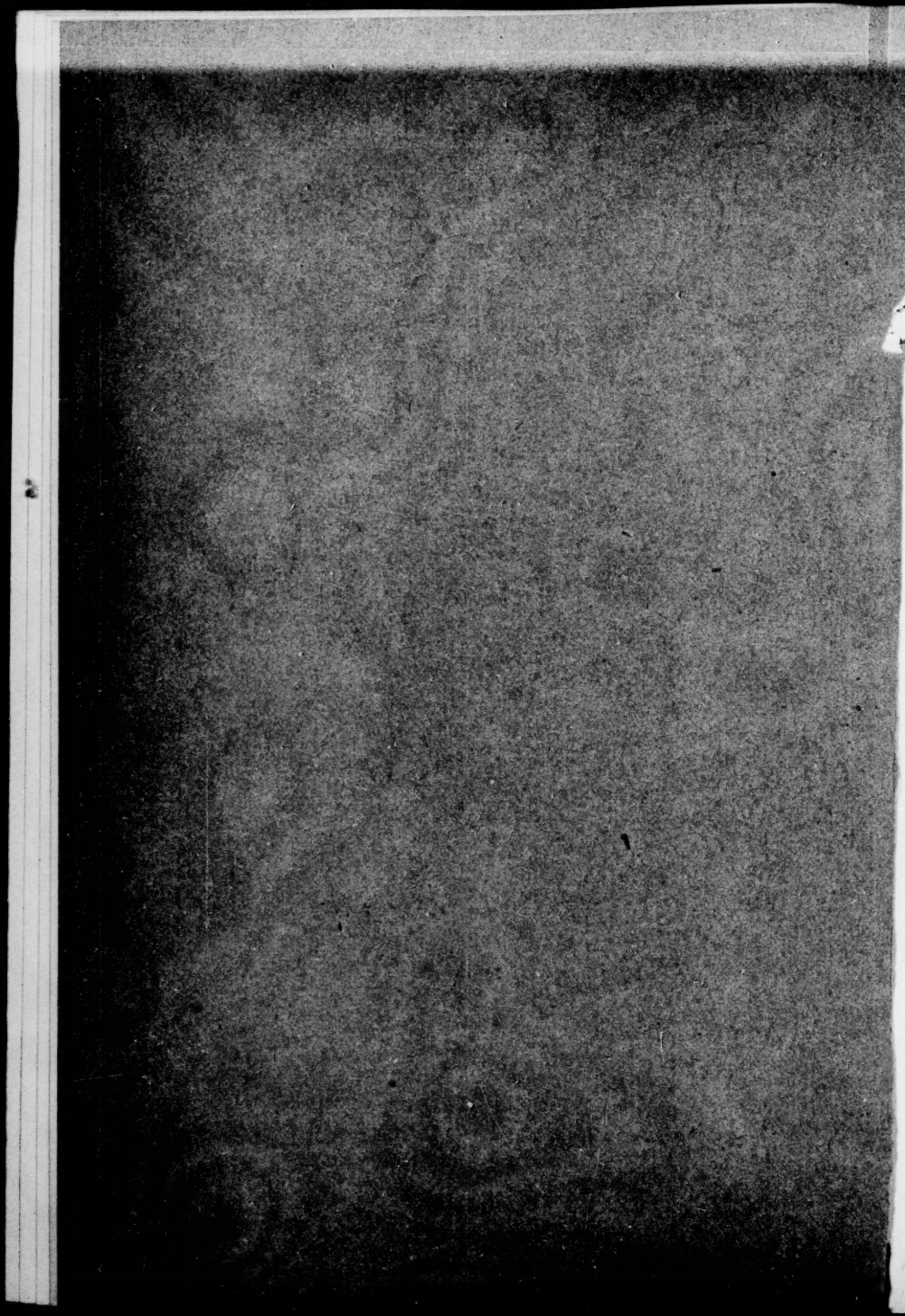
OF HARTFORD, CONN.

Appeal from the Supreme Court of the Territory of Utah.

BRIEF

Of A. P. HYDE, Attorney for Appellee.

HARTFORD, CONN.:
PRESS OF THE CASE, LOCKWOOD & BRAINARD COMPANY.
1891.



Supreme Court of the United States,

OCTOBER TERM, 1891.

TERM NO. 115.

MATTHEW T. GISBORN, APPELLANT,

VS.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, APPELLEE.

Appeal from the Supreme Court of the Territory of Utah.

BRIEF IN BEHALF OF THE APPELLEE, THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONN.

The record in this case shows that on or before the 24th day of February, 1874, Obadiah Embody, Warren D. Heaton, William E. Miller, and Matthew T. Gisborn, the appellant, were the owners of the Mono mine as tenants in common thereof,— Embody, Heaton, and Miller owning an undivided two-thirds interest thereof, and Gisborn owning an undivided one-third interest thereof. On said February 24, 1874, Gisborn entered into an agreement with his co-tenants, Embody, Heaton, and Miller, to buy out their interest for the sum of $400,000, and they, on that date, signed, sealed, and acknowledged the deed mentioned as "Exhibit A" in the record, page 20, which upon its face purported to convey the two-thirds interest of Embody, Heaton, and Miller to Gisborn in fee.

Thereupon Gisborn, accompanied by Warren Hussey, went to New York to raise money to pay for the interest of his said co-tenants as described in said deed, and there obtained from Messrs. Allen, Stephens & Co., Bankers, through William A. Stephens, one of their co-partners, as their trustee, $100,000 to pay off Embody, one of said grantors of said two-thirds interest, who was urgent for his pay. As security for the re-payment of this sum of $100,000 so advanced by said Allen, Stephens & Co., through William A. Stephens, trustee, Gisborn and said Warren Hussey executed and delivered to William A. Stephens, trustee, four notes for the sum of $25,000 each, which appear on pages 84 and 85 of the record. These notes were dated the 30th day of April, 1874. As further security for the payment of the one hundred thousand dollars Gisborn executed and delivered to William A. Stephens, as trustee, the deed mentioned as "Exhibit B," page 22 of the record. This deed purported to convey to Stephens as trustee an absolute title to ten-eighteenths of said Mono mine. Afterwards, on or about the 6th day of May, 1874, the said Allen, Stephens & Company, through said William A. Stephens, trustee, advanced the further sum of $300,000 to Gisborn to pay said Heaton and Miller for their interest in said two-thirds of said Mono mine. The two amounts so advanced by Allen, Stephens & Co., through William A. Stephens as trustee, amounting in all to $400,000, were paid to the said Embody, Heaton, and Miller as the consideration for the deed to Gisborn, referred to on page 20 of the record as "Exhibit A."

On said 6th day of May, 1874, Gisborn also signed, sealed, and acknowledged the deed mentioned as "Exhibit C" in the record, page 25, by the terms of which eight-eighteenths of the Mono mine were conveyed to said Stephens as trustee. By the two deeds, "Exhibit B" and "Exhibit C," each of which contains covenants of warranty, Gisborn conveyed to Stephens, as trustee, all the Mono mine, and vested in him, as trustee, the entire legal title to the property, and this was

recognized and admitted by Gisborn in the declaration of trust received by him from Stephens, trustee.

The deed dated February 24, 1874, "Exhibit A," was delivered to Gisborn, and was duly recorded in the proper county June 12, 1874.

This deed is the only source, so far as appears from the record, from which either said Gisborn or the said William A. Stephens, trustee, have ever claimed or now claim to have derived any title to the two-thirds interest in said mine, formerly owned by Embody, Heaton, and Miller.

On the 30th day of May, 1874, said Stephens, trustee, executed and delivered to Gisborn his declaration of trust, a copy of which is found on page 27 of the record, marked "Exhibit D," which was recorded in the proper county on the same day that "Exhibit A" (the deed of Embody, Heaton, and Miller to Gisborn), was recorded to wit, June 12, 1874. Gisborn on the trial stated that the deeds "Exhibits B and C," were prematurely put on record. But the declaration of trust shows that as between the parties thereto the deeds from Gisborn to Stephens, trustee, were to be taken and considered as executed and delivered at the dates on which they were respectively executed.

It is clear that the deed of April 30, 1874, Exhibit "B," from Gisborn to Stephens, conveying 10-18ths of the mine, and the deed of May 6, 1874, Exhibit "C," from Gisborn to Stephens, trustee, conveying 8-18ths of the mine, were given for the sole purpose of securing the advance of the $400,000 made to Gisborn by Stephens as trustee. As to the question for whom was Stephens as trustee acting, and who were the real *cestuis que trust*, we will speak hereafter.

POINTS.

I.

The declaration of trust executed by Stephens, dated May 30, 1874, Exhibit "D," recognizes these deeds as valid.

It appears from the record that at the time these deeds and this declaration of trust were executed the Mono mine was exceedingly productive, and it was believed by all parties that the rents, issues, and profits from the mine would be sufficient in a short time to pay off this sum of $400,000 so advanced. The deed of trust executed 30th May, 1874, recognizes the idea that this advance was to be paid off from the rents, issues, and profits, and goes forward to determine the priority of the claims upon the whole mine. First, there was to be paid the expenses of running the mine. Second, all the proceeds of the mine, subject to the operating expenses, were to be devoted to the repayment of the $400,000 advanced. After this had been done, all subsequent income from the mine was to be paid to Gisborn, to whom the money was advanced, until he should receive a certain amount specified in the deed of trust. When that had been done the trust was to cease, and thereupon the whole fee of the mine should be reconveyed to Gisborn as the absolute owner thereof — but not until the advance of $400,000 had been repaid.

The acceptance of this trust deed is a clear recognition that the mine, with its rents, issues, and profits, was pledged for the payment of the advance of $400,000, after defraying the running expenses of the mine, and that, after this sum had been repaid, the whole interest in the mine would revert to Gisborn.

It appears that Gisborn on the same day the declaration of trust was executed, May 30, 1874, made an agreement with Hussey to convey to him a one-half interest in the mine

(see plaintiff's Exhibit "No. 3," page 108 of the record); but, on examination of said exhibit, it will be seen that Gisborn therein recognized the conveyance made to Stephens in trust and the validity of the declaration of trust executed by Stephens, and that it is an agreement that as soon as the uses and purposes of said trust should be fulfilled and accomplished according to the terms of said declaration of trust, reference thereto being had for particulars, Gisborn would assign to Hussey, his heirs, and assigns a one-half undivided interest in said Mono miné. In other words, until the $400,000 advance had been paid off under the terms of the declaration of trust, Gisborn claimed no title to the property; but, when it should be paid off according to the terms of that instrument, then he agreed to give Hussey a one-half interest in the mine. Doubtless this was done to compensate Hussey for his services in aiding Gisborn to obtain the advancement from Allen, Stephens & Co., and also for the aid he had promised to give Gisborn during the period while said advancement was being paid off. It is clear that this contract can have no bearing upon the question now before the court, except that it corroborates our claim that Gisborn claimed no interest in the mine until after the advance of $400,000 had been repaid to Allen, Stephens & Co., or to William A. Stephens, trustee. The subsequent agreement which appears in the record, page 109, between Hussey and Stephens, dated August 10, 1884, in which Hussey agreed to convey this one-half interest to Stephens individually, can by no possibility have any bearing upon the decision of this case.

II.

Parol testimony on the part of the plaintiff to show for whom Stephens, trustee, was acting and who were his cestuis que trust was properly admitted.

By the deeds from Gisborn to Stephens dated April 20 and May 6, 1874, marked Exhibits "B" and "C," the whole of

Mono mine was conveyed to Stephens, who was described as trustee. There is nothing in these deeds to indicate for whom Stephens was trustee.

In the declaration of trust by Stephens of May 30, 1874, which appears on page 27 of the record, it clearly appears that the purpose of the trust was to secure first the expenses of operating the mine by the trustee, and secondly, the repayment of the $400,000 advanced to Gisborn for the purchase of the two-thirds interest in the mine, and after that, the trust was to continue for the benefit of Gisborn to pay him certain sums of money; and when these trusts were completed, and not till then, the mine was to be reconveyed to Gisborn. There is nothing in the declaration of trust stating to whom the $400,000 advances were to be paid. But it was proved by uncontradicted testimony that these advances were made by Allen, Stephens & Company, of which firm Stephens, the trustee, was a member, so that in fact Allen, Stephens & Company were the *cestuis que trust*, as to this advance of $400,000, which was to be repaid under the trust deeds and the declaration of trust.

It is objected by the appellant that the appellee was allowed to prove by parol testimony for whom the trustee was acting, and who furnished the $400,000.

That in such a case it is competent by parol testimony to show who were the real beneficiaries under the trust, and who were the real *cestuis que trust*, seems too clear to need argument.

We deem it unnecessary to multiply authorities on this point, but cite the case of *R. R. Co.* vs. *Durant*, 95th U. S., 576. In that case the marginal note is as follows:

> "Where a conveyance of real estate is made to the grantee as 'trustee' without setting forth for whom or for what purpose he is trustee, parol evidence is admissible to establish the fact."

And on page 579 the court say:

> "All the deeds but one designate the appellee as 'Trustee,' without setting forth for whom or for what purpose. Parol evidence was admissible to show these things. The designation alone was sufficient to devolve the duty of inquiry upon any third person dealing with the property," citing various cases.

III.

The assignment of Allen, Stephens & Company to the Charter Oak Life Insurance Company, the appellee, vests it with all the rights of the original cestuis que trust.

It appears by the record that on the 12th of February, 1875, Allen, Stephens & Company assigned to the plaintiff all their interests as such *cestuis que trust* (Record, page 86). That such an assignment is valid to convey to the assignee, the appellee, in this case, all the beneficial interest of the *cestuis que trust* (Allen, Stephens & Company) in the trust estate, is also fully settled. We refer to the 2d of Pomeroy on Equity Jurisprudence, Section 989.

IV.

The expenses incurred by the trustee and set out in the petition for foreclosure are a proper lien on the trust estate.

It appears by the record and is admitted by both parties that soon after Stephens, as trustee, entered upon his duties as such, the mine, owing to a fault in the vein, ceased to be productive, and that thereafter said trustee incurred a liability for large sums, amounting in the aggregate to $51,796.30, in order to develop the mine and restore its productiveness.

These liabilities were incurred by the trustee and became a first lien upon the mine. That these expenses were properly incurred in the legitimate exercise of the duties of the trustee we do not understand is denied. In fact, all of those expenses mentioned in the complaint, Nos. 3 to 14, inclusive, and found between pages 10 and 16 of the record, were incurred with the consent and approval of the appellant, Gisborn, were submitted to him as a manager under the trustee, and were approved by him in writing (Record, page 105). Claim 2 was a judgment against Gisborn and the trustee.

It therefore does not lie in the mouth of Gisborn to claim that those expenditures allowed by the court were either unreasonable or were not a proper charge against the trustee in the execution of his trust.

It appears from the record and is found that the trustee had no means of meeting these bills, which, if paid by him would be a proper charge against the trust estate, and thereupon the appellee, who had by the assignment from Allen, Stephens & Company, become the owner of the claim for $400,000, for which this mine had been pledged, for the purpose of avoiding costs and execution against the mine, at the request of Stephens, trustee, advanced the money to pay off these legitimate claims against Stephens, and thereby became entitled to the same right of priority in the security that Stephens, trustee, would have had if he had paid them off from his own funds.

That these expense accounts were a first lien upon the trust estate, and that the appellee who furnished the money is entitled to the lien in the same manner as the trustee would have been entitled thereto had he advanced the money, is so fully argued and discussed in the opinion of the Supreme Court of Utah in this case, which is a part of the record, that we deem it unnecessary to repeat the argument here, or to re-cite the cases referred to in that opinion (Record, pages 165, 166).

Under these circumstances, this action was brought to subject the mining property itself to the payment of the whole indebtedness, to wit, $51,796.30 incurred by the trustee in operating the mine under his trust deed, and the $400,000 advanced by Allen, Stephens & Company, since assigned to the appellee, and to have the same declared charges and liens thereon.

V.

In the court below the appellant claimed, and perhaps may here, that the advance of $400,000 was not made to Gisborn to enable him to purchase from his cotenants the two-thirds of the mine which he did not previously own, but was really advanced for a purchase of said mine by Stephens: that this was the aim and object of the parties, and that Gisborn was only a surety in the matter helping Stephens to make his purchase.

This is so opposed to the evidence which appears from the deeds themselves that it merits but little argument to refute it. The deed from Embody, Heaton, and Miller of the two-thirds interest was made directly to Gisborn, and Gisborn, by his two deeds, dated respectively April 30 and May 6, 1874, conveyed the whole of the mine, including his one-third, to Stephens as trustee. That this was intended as security for the advance, enabling Gisborn to purchase the two thirds interest, clearly appears from the declaration of trust wherein the $400,000 is expressly declared to have been advanced to Gisborn for the purchase of two undivided thirds of the mine from his late cotenants, and is made a first lien (after defraying the expenses of operating the mine) upon the mine and its rents, issues, and profits and the whole mine was to be retained by Stephens, trustee, until this sum of $400,000 had been repaid. After its repayment it is true that by the pro-

visions of the declaration of trust the title to the mine was to be retained by Stephens until certain sums were first paid to Gisborn, and when that was done the whole mine was to revert to Gisborn free from the trust. This will appear from the provision in said trust deed (page 28 and 29 of Record) wherein Stephens stipulated as follows:

> "I, the said William A. Stephens, trustee as aforesaid, do covenant and agree to and with the said Matthew T. Gisborn, his heirs and assigns, that I shall and will duly apply all the rents, issues, and profits of said property to the uses aforesaid, in the order aforesaid, and as soon as the same shall be received by me, and further, that as soon as said uses shall be fulfilled and discharged I will cause said conveyance of said premises to me to be cancelled of record by doing such acts and executing such instrument as may be necessary to recover or revert the title of said premises, with the tenements, hereditaments, and appurtenances thereto appertaining to and in the said Matthew T. Gisborn, his heirs and assigns, to the same extent and estate as now held by me as aforesaid as trustee."

In other words, the declaration of trust recognizes the fact that the $400,000, with the interest thereon, is to be repaid first, and when so repaid the remaining interest in the property is to revert to and become the property of the said Matthew T. Gisborn.

This clearly is a recognition of the fact that the money was advanced to Matthew T. Gisborn to purchase the two-thirds interest in the mine and that he pledged the whole of the mine with its rents, issues, and profits for the repayment of that sum, and that then and not till then the mine with all its rents, issues, and profits was to become the sole property of Matthew T. Gisborn.

This point also is so fully considered and discussed in the opinion of the Supreme Court of Utah (Record, pages 158 to 161 inclusive), that we deem it unnecessary to lumber this brief with any fuller argument.

VI.

It is claimed by the appellant in this case that this advance of $400,000 and the expense accounts allowed by the court, amounting to $51,796.30, are barred by the statute of limitations, so that no decree can be had thereon.

This claim proceeds upon the idea that in this proceeding we are seeking to hold Matthew T. Gisborn, appellant, personally responsible for these claims. Such is not the fact. This is not an action at law against Matthew T. Gisborn, and there is no attempt to charge him personally with the payment of these various sums. It is simply an attempt to realize the sums out of the trust estate which was pledged to secure the same.

That the trust given to secure these claims was an express and continuing trust fully appears from an examination of the trust deeds ("Exhibits B and C"), and the declaration of trust ("Exhibit D"). The whole mine was deeded to Stephens as trustee.

In the declaration of trust the priority of the different claims was clearly set out, and it also clearly appeared that the title under the trust deeds was to continue in Stephens until the claims mentioned in the trust deeds had been fully paid and satisfied.

It is well settled that in the case of an express and continuing trust the statute of limitations has no application.

In *Kane vs. Bloodgood*, 7th Johnson, Ch. 90, the court says:

> "It is a general rule in the books that there is no statute of limitations to a charge upon an estate" (page 116).

Again says the Judge:

> "I take it for granted as the assumed doctrine in all these cases that an action at law will not lie in the case of a mere

charge upon lands where there is no personal undertaking" (page 116).

Again,

"It does not bar so long as the trust is a continuing and acknowledged trust" (page 123).

In the case at bar, an accounting in equity was absolutely necessary to ascertain the amount of rents, issues, and profits received by the trustee, before the relative amount and priority of the liens could be ascertained. The trust estate soon proving unproductive, such outlays as were proper or necessary to protect the property became a lien; the place and right position of which as to the other liens or charges is to be determined by a court of equity. As to the other sums mentioned in the declaration of trust, there can be no remedy at law. There was created by that declaration a technical, continuing trust — a charge upon the Mono mine — which has not been executed or discharged, there being no personal undertaking, as claimed by the appellant.

The case already cited from the 7th of Johnson Chancery Reports, page 90; Angell on Liens, 166; *Governor* vs. *Woodworth*, 63 Ill., 254, and *Hayward vs. Gunn*, 82d Ill., 385, 388. are all cases showing that the bar of the statute of limitations cannot be set up in this case.

The statute of Utah has settled who is a trustee of an express trust, to wit:

"A trustee of an express trust, within the meaning of this section, must be construed to include a person with whom or in whose name a contract is made for the benefit of another." — Compiled Laws of Utah of 1888, Vol. 2, p. 230, Sec. 3171.

This contract of trust was made in the name of Stephens, for the benefit of Allen, Stephens & Co., and for that of Gisborn, and of the parties assisting by their money and labor in the execution of the trust.

But on this point we also refer to the opinion of the Supreme Court of Utah, pages 163–4–5 of the record.

But were these claims, if not protected by an express trust, barred by the statute of Utah?

Under the Compiled Laws of Utah of 1876, on page 366, and the laws of 1884, page 191, it is provided that an acknowledgment or promise contained in some writing, signed by the party to be charged thereby, is sufficient evidence of a new or continuing contract, and by these statutes of 1876 and 1884, a contract founded upon an instrument in writing is not barred under four years. The same provisions appear in Compiled Laws of Utah of 1888, Sections 3143 and 3165.

Now, the declaration of trust was executed May 30, 1874. The lease from Stephens, trustee to Marshall, Royle & Clark was dated January 1, 1878, less than four years after the declaration of trust, and on this lease Gisborn, in writing, signed by him, acknowledged the declaration of trust and the rights of the parties therein as still continuing. (Record, pages 112 and 113.)

On February 15, 1879, a lease was made between the same parties who signed the previous lease, commencing January 1, 1879, and ending January 1, 1880; and again Gisborn, in writing thereon, acknowledged the declaration of trust and the indebtedness therein as valid and subsisting. The Charter Oak Life Ins. Co., the appellee, also endorsed on such lease to which Gisborn was a party that the lease was to be without prejudice to the rights of the appellee in said Mono mine property. (Record, pages 113 and 114.)

In less than four years after the expiration of the last lease, to wit, August 20, 1883, this suit was brought.

These facts in the record show that had Gisborn been personally liable and had an action at law been brought against him, the bar of the statute would not have availed him in such case.

But, suppose it were true that these claims now made by the appellee were personal liabilities against Gisborn, and that an action at law could have been maintained against him for the recovery thereof, and that such action was barred, still it does not follow that this proceeding to charge the trust estate with the payment of those claims cannot be maintained.

This is not a suit against Gisborn, as we have already remarked, seeking to charge him with any personal liability; it is simply an effort to subject the property pledged for the payment of the claims to the liquidation thereof.

In the case of *Belknap* vs. *Gleason*, 11th Conn., 160, it is held (we quote the marginal note, for it is fully sustained by the decision of the court):

> "Statutes of limitation being statutes of repose, suspend the remedy, but do not cancel the debt."
>
> "Though the statute of limitations is equally available, as a defense at law and in equity, yet where there are two securities for the same debt, one of which is barred by the statute, and the other not, the creditor, notwithstanding he has lost his remedy at law on the former, may pursue it in equity on the latter."
>
> "Where the security for a debt is a lien on property, personal or real, that lien is not impaired, in consequence of the debt being barred, by the statute of limitations."

This was decided in 1836 and has been frequently approved by the Supreme Court of Connecticut since.

In 1859 it was held by the Circuit Court of the U. S. (See *Sparks & Kelsey* vs. *Pico*, 1st McAllister, C. C., 497):

> *Head note.*—"The fact that the note is barred by the statute of limitations and no action at law can be maintained upon it, does not estop the holder of a mortgage from prosecuting his lien upon the mortgaged premises in a court of equity. The statute of limitation bars the remedy upon the note, but does not extinguish the debt."

In 1884 the Circuit Court of the United States, in *Hickox* vs. *Elliott*, 10th Sawyer, C. C., 422, (s. c., 22 Fed. R., 13,) held:

> "But it is immaterial whether an action could now be maintained by White against Elliott to recover this money or not. This is not such an action, but a suit brought by a person claiming to be the assignee of a decree to subject the property of the debtor therein to its payment and satisfaction. And it can be maintained, although the right of action against Elliott to recover the money in question is barred by lapse of time. The statute bars the remedy against Elliott in six years, but does not destroy the debt, and it still exists for the purpose of enforcing any lien or pledge given to secure its payment."

See also *Grant* vs. *Burk*, 54 Cal., 298.
Ord vs. *DeLa Guerre*, 18 Cal., 75.
Bacon vs. *Rivers*, 106 U. S., 99 and 107.

VII.

No claim can be made here that this trust of Stephens has been terminated.

Mere neglect of duty for a long time to administer a trust does not terminate it.

Tainter vs. *Clark*, 5 Allen, 66.

In Perry on Trusts, section 274, the author says:

> "If a trustee once accepts the office, he cannot by his sole action be discharged from its duties. Having once entered upon the management of the trust, he must continue to perform its duties until he is discharged in one of three ways: First, he may be removed and discharged, and a new trustee substituted in his place, by proceedings before a court having jurisdiction over the trust; second, he may be discharged, and a new trustee appointed, by the agreement and concurrence of all the parties interested in the trust; and, third, he may be discharged, and a new trustee appointed, in the manner pointed out in the instrument creating the trust, if it

makes any provisions upon that subject. Mere abandonment of the trust will not vest the trust property in the hands of his co-trustee, nor relieve a trustee from liability."

See also

Cruger vs. *Halliday*, 11 Paige, Ch. Rep., p. 314.
Thatcher vs. *Candee*, 3 Keyes, N. Y., 157.
Adams Equity, with American notes, side page 38.
Ferris vs. *Coover*, 10 Cal., 631.

But the proof conclusively shows that Stephens never has abandoned his trust, nor done any act indicating an intention so to do.

After having expended the money received from the Charter Oak Life Insurance Company in an attempt to develop the mine, the company having refused to make further advances, Stephens, on April 21, 1877, wrote to Gisborn, setting out his inability to obtain more money from the Charter Oak Life Insurance Company to enable him to go on with the work, and asking him if he could assist in furnishing money to continue the work. On the same day Gisborn replied (Record, page 92) that he was unable to furnish any money, and coincided with the suggestion of Stephens that the property should be leased. Thereupon the leases already referred to were made, which were approved by Gisborn, and also by the Charter Oak Life Insurance Company; and from that time to the time of the commencement of the suit Mr. Stephens testified (Record, page 99) that he had never "forsaken or abandoned said mine, or any right or interest therein as trustee, or my said trust, or my rights or duties in the premises as trustee."

VII.

The appellant insists that the indebtedness of $400,000 and the expense account of some $52,000 are not a lien upon the mine itself, but by

the declaration of trust are simply to be paid out of the rents, issues, and profits of the mine, that is, they are to be paid out of the ores of the mine, and that this is a prohibition upon the taking of the mine itself to pay these liens.

In determining this question, the trust deeds executed by Gisborn to Stephens as trustee and the declaration of trust by Stephens must be read together.

This is not a case where, as sometimes has happened, a conveyance has been made solely of the rents, issues, and profits to secure a debt; but the deeds of trust convey the fee of the mine to Stephens as trustee. Thereupon, Stephens as trustee makes a declaration of trust showing for what purpose this deed of trust of the mine itself was made to him; and in such declaration of trust Stephens trustee, says that — (Record, page 28.)

> "Such conveyance was made and received upon the trusts, nevertheless, and to and for the uses, interests, securities, and purposes hereinafter limited and specified, described, and declared — that is to say, upon trust to receive the issues, rents, and profits of the said premises, and to apply the same as received as follows," etc.

Then follows in the declaration of trust a description of the claims which are to be secured thereby: first, the expenses of operating the mine; second, the $400,000 advanced to Gisborn to enable him to buy $\frac{2}{3}$ of the mine, and after that the trust is to continue until Gisborn had received a percentage of $\frac{1}{3}$ of the net profits of the mine; and fourth, to pay to Gisborn $275,000 with interest; and it is then provided that after these payments have been made and the trust completed, the trustee should reconvey to the said Gisborn the whole of said mine.

It clearly appears from reading this trust deed that the whole title to the mine was to remain in Stephens, trustee, un-

til, first, the expenses of operating the mine had been paid up; secondly, the advance of $400,000 had also been paid; and that after that the whole beneficial interest in the mine belonged to Gisborn.

It has been held that a mere assignment of rents and profits for the purpose of securing the debt, amounts to an equitable lien upon the realty, and an assignee may, in equity, insist upon its enforcement as a mortgage.

In 1st of Veasey, Jr., Rep., page 162, *ex parte Wills*, Thurlow, Lord Chancellor says:

> "An assignment of rents and profits is an odd way of conveying, but it amounts to an equitable lien and would entitle the assignee to come into equity and insist upon a mortgage.

This doctrine has been sustained by our text writers and by numerous decisions. See —

1 Jones on Mortgages, Sec. 171.
3 Pomeroy's Equity Jur., Sec. 1237.

See also cases cited by the Supreme Court of Utah in their opinion. (Rec., page 162.)

This objection of the appellant is fully and ably discussed by that court in their opinion (Record, pages 161–2–3), and we will not repeat the reasons and authorities there given.

IX.

It further appears from the record that the appellant made many objections to the admission of testimony.

We have no means of ascertaining on which of these many objections the appellant intends to rely. In reply to these

objections, we can only say that the appellee offered no parol evidence for the purpose of contradicting or in anywise varying any written instrument between the parties, and the court ruled that in the admission of testimony and in considering the testimony offered, parol evidence could not be allowed to contradict a written contract, etc., between the parties. If, in any part of the trial, such evidence was admitted, the court announced that it would not consider such evidence as against the writing, and of course it did not; and in such case the original admission could work no injury. The court explained all this fully to the counsel in the progress of the case, as will be found on pages 123–4 of the record, and also in the opinion delivered by the Supreme Court of Utah (page 159 of record).

Of course it is not needful here to cite authority to show that parol testimony is admissible to explain or make certain a latent ambiguity, or that the court may hear evidence to ascertain an ambiguity and what kind of an ambiguity.

It is laid down in 1 Greenleaf's Evidence, Sec. 298, that

> "No judge is at liberty to pronounce an instrument ambiguous or uncertain until he has brought to his aid in its interpretation all the lights afforded by the collateral facts and circumstances which, as we have shown, may be proved by parol."

And it is only after the court has placed itself, as it were, in the place of the party speaking in the writing which it is attempting to construe and has looked into the evidence of surrounding circumstances and collateral facts that it will declare a patent ambiguity in the instrument.

On this point Greenleaf says, Sec. 300:

> "The patent ambiguity, therefore, of which Lord Bacon speaks, must be understood to be that which remains uncertain to the court after all the evidence of surrounding cir-

cumstances and collateral facts which is admissible under the rules already stated is exhausted."

But, even if there was a technical error in admitting some of the evidence complained of this case should not be reversed, the case below having been tried by the court.

In the first of Greenleaf on Evidence, 13th Ed., Section 298, Note 1, the author says:

"It was decided in Bruff v. Coneybeare, 9 Jur., n. s. 78, that when evidence legitimately admitted in the course of a trial, raises a latent ambiguity, evidence to explain it is properly admissible, and if there were in truth no latent ambiguity, and the evidence to explain was consequently inadmissible, still the improper admission of such evdence would not be a ground for a new trial, because the writing would then be for the court to construe without regard to the evidence. And if the jury, with the aid of the evidence, had put the true construction upon it, the verdict should stand, Morse v. Weymouth, 28 Vt., 824; and if not, the court might render such a judgment as the true construction required, notwithstanding the verdict."

If any evidence has been improperly admitted in this case, which did not influence the judge below in rendering his decision: and if the judge below would have reached the same decision if such improper evidence had not been introduced; in other words, if, notwithstanding some such alleged error, this court can see that the judgment is right and just, and that a new trial, eliminating these errors therefrom, would or should lead to the same judgment, then this judgment should not be reversed.

The admission of improper evidence is no ground for a new trial if the party moving for it was not prejudiced thereby.

Redfield vs. *Buck*, 35 Conn., 329.
Scofield vs. *Lockwood*, 35 Conn., 425.

We do not admit that any such errors exist, but give what we contend is the rule, if the supposed errors are found in the record.

3 Estee Plead. (3d Ed.), Sec. 5115.
Clayton vs. *West*, 2 Cal., 381.
Hastings vs. *Jackson*, 46 Cal., 234.

X.

Another objection raised by the appellant is that certain advances claimed to have been made by Gibson for expenses connected with the operation of the mine were not allowed by the court.

To this we answer that the testimony in regard to advances made by Gisborn was objected to at the time, but the court overruled the objection for the time being, and reserved the point. In its decision the court below stated that these advances of Gisborn were not set up nor pleaded (Record, page 166), and had not been proven (Record, page 71).

The consideration of the same was properly excluded.

First, for the reason that these claims were not pleaded, and therefore could not be considered. Instead of his alleging that he had a lien on the estate for any sum of money, he denies, under oath, that there were any liens whatever existing against the estate, or that anything was owing under the trust, or that the trust was a valid subsisting trust in any respect.

Gisborn swears in his answer that none of the papers executed were given to secure any indebtedness, or for the payment of any money, and denies that the realty was to be liable for any sum whatever. (See record, pages 33–34.) He also swears (on page 35 of the record) as follows:

"Defendant further denies that any of the work done upon the said mine, or any expenses incurred in working the same, during any of the period of time from the date of said declaration of trust until to-day, were a charge upon the said trust estate, in default of any profits or otherwise."

He should not be permitted to deny the trust and claim under the trust in the same breath.

Again, at the bottom of page 35 and on page 36 of the record, in his answer, he denies the facts upon the existence of which he could alone charge the trust estate with his claim.

Second. Gisborn never presented his claim to the trustee, or demanded of him payment thereof. (Record, page 133.)

Third. Gisborn never paid or took up the $5,000 note. McCormick refused to give it up and still holds it. If it had been proven that the note was given by authority of the trustee (which was not done), the note itself would be the best evidence of the debt. Possession of this note, which he says he paid, was necessary to give him a claim against the trustee. McCormick refused to give up this note Gisborn says he paid, and still holds it as the owner thereof. (Record, pages 132, 133.)

Fourth. As to the $600 or $700, there was no evidence that it was paid for any purpose in the purview of the trust. Holman & Adams had no power to give notes, or audit or pay claims. (Record, page 134.)

Fifth. But it is enough that Gisborn never presented his claim to the court in pleading in such a manner as to have it passed upon, and when permitted to make his showing without pleading, he failed to prove the indebtedness.

XI.

The refusal of the District Court to grant a continuance on the application of Gisborn is assigned for error.

The refusing or granting a continuance is a matter very much in the sound discretion of the court, and unless that discretion was abused, and this is made clearly to appear, it is not a subject of review by the higher court. There is no evidence in the case which can satisfy this court that the District Court did not act within a sound discretion in refusing to allow a continuance.

This matter is also discussed in the opinion of the Supreme Court of Utah, on pages 166–7 of the Record, to such an extent that it is unnecessary for us in this brief to add anything thereto.

ALVAN P. HYDE,
Attorney for the Appellee.

Office Supreme Court U. S.
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Supreme Court of the United States.

No. 115.—October Term, 1891.

Matthew T. Gisborn, Appellant, *vs.* The Charter Oak Life Insurance Company of Hartford, Connecticut. } Appeal from the Supreme Court of the Territory of Utah.

SUPPLEMENTAL BRIEF FOR APPELLANT.

I. The Statute of Limitations.

At page 11 of his brief, counsel for appellee replies to our argument that this case was barred by the Statute of Limitations

First. That, although the indebtedness might be barred, the mortgage itself (or the instruments which are here being enforced as a lien equivalent to a mortgage) is not barred; and cites cases from States where the mortgage itself would not be barred under twenty years.

In California, however, from which State Utah takes its entire jurisprudence, and from which State Utah has copied literally the Statute of Limitations, it is expressly provided by statute, and held by the courts, that a mortgage is barred in four years under a provision of a statute already quoted in our brief, to wit: "Within four "years: an action upon any contract, obligation, or lia- "bility founded upon an instrument of writing, except "those mentioned in the preceding section," which were judgments or decrees.

Under this provision the courts have held, without dissent, that mortgages and other instruments creating liens by way of contracts are barred in four years. They are "instruments of writing," and the statute is applicable to them.

I refer on this subject to Deering's Code of Civil Procedure, section 337 and note, and discussion in the note; McCarty *v.* White, 21 Cal. 495; Lord *v.* Morris, 18 Cal. 482. In McCarty *v.* White, the court say: "Where an "action upon a promissory note secured by a mortgage of "the same date upon real property is barred by way of the "Statute of Limitations, the remedy upon the mortgage is "barred." See, also, Reed *v.* Edwards, 2 Nev. 262; Henry *v.* Mining Co., 1 Nev. 621; Mackie *v.* Lansing, 2 Nev. 302; Cooks *v.* California, 9 Nev. 199.

Second. Counsel for the appellee replies that Gisborn has revived any promise that may be found in the promissory note or implied promise in the declaration of trust by consenting to the leasing of the property. The terms of this leasing may be found at page 113 of the record. It will be remembered, as I have said in the original brief, that the trustee abandoned possession in 1877, and, as he testified, active work then ceased. Record, page 99, folio 323. After that the property was leased by two several leases to persons who desired to make exploration. The terms of the last lease are found at folio 365. The lease is from Wm. A. Stephens to Marshall, Royle, and Clark. The plaintiff, Charter Oak Life Insurance Company, apparently was not consulted with regard to it, and certainly was not a party, although the assignment had been made to the plaintiff on the 12th of February, 1875. Record, page 86. So that Stephens had no right, title or interest in this property at the time of making this lease, except as a mere naked trustee. All beneficial interest in it had passed from him. He executes the lease to the lessees therein, and they procure the following ratification;

" In consideration of the premises aforesaid and for value " received, I do hereby endorse my signature upon said " lease, and I do hereby authorize, ratify, and confirm " the foregoing lease. Matthew T. Gisborn." This is dated February 15, 1879. This is claimed to be a renewal of the obligation under the provision of the statute of Utah which counsel for the appellee refers to but does not quote, which reads as follows:

Section 3165, par. 218, Compiled Laws of Utah, 1888, p. 228: "No acknowledgment or promise is sufficient evi- " dence of a new or continuing contract by which to take " the case out of the operation of this title, unless the " same is contained in some writing signed by the party " to be charged thereby." Precisely the same provision as section 360 of the California Code. See Deering Code of Civil Procedure, section 360, and notes to that section. Under this statute the signing of that lease by Gisborn would not revive or take the case out of the statute of limitations, for the reasons, 1st, that the promise or acknowledgment must be a "direct, distinct, unquali- " fied, and unconditional admission of the debt which " the party is liable and willing to pay." McCormick *v.* Brown, 36 Cal. 184, and other cases quoted in Deering in the notes aforesaid.

This endorsement of his, that the lessee might go into possession, is not the unqualified promise that he would pay any obligation whatever.

2d. The new promise to take the case out of the statute must be a promise or admission made to the creditor himself for the purpose of reviving the obligation. At the date of this endorsement the Charter Oak Life Insurance Company was not the creditor; the promise was not made to it. *An admission to a stranger is not sufficient.* Biddell *v.* Brizzolara, 64 Cal. 354. The syllabus of that case reads: " To establish a new contract for the purpose of " taking the case out of the statute of limitations there

" must be an acknowledgment from which a promise is " necessarily implied, and such promise or acknowledg- " ment must be made to the creditor himself." This promise was made more than four years before the commencement of suit—in February, 1879, suit was brought in August, 1883, under the lease. The possession was abandoned before August, 1879, at which time Gisborn took possession and has remained there since.

For these reasons we claim that the statute of limitations applies to this plaintiff, provided he was a creditor. If he was not a creditor, he has no standing in this suit to foreclose. A suit to foreclose a lien on real property is barred if an action at law might originally have been brought and that action is barred. Suit might have been brought on the promissory notes. If the $300,000 was a loan to Gisborn, according to theory of complainant, then suit might have been brought on that, and thus the whole $400,000 is barred.

II.

I again call attention to the doctrine that a lien upon real estate must either be created by law; that is, by some statute, or by the contract of the parties. The contract of these parties did not make the $400,000 a lien upon anything but "*the rents, issues, and profits,*" and the expenses incurred in hunting for the lost vein were not thought of or dreamed of by the parties, and are in no way included within the contract. Our position on that subject is fully corroborated by the case cited in the brief, New *v.* Nicoll. In that case certain real estate in the city of New York was conveyed to the defendant Nicoll upon trust, to receive the rents, issues, and profits thereof, and after paying therefrom all taxes, assessments and other charges thereon, to apply the rest and residue to the sole and separate use of Sophia V. I. Reynolds, during her

natural life, and after her decease, upon trust, to convey the real estate as she by her last will and testament should direct, and other trusts. Nicoll took possession of the real estate and assumed the duties of the trust. Repairs became necessary to the building situated thereon and certain work in the way of making repairs was done on this property under the expectation that the estate would pay for it. The defendant had no trust funds in his hands with which to pay for it, and the court say: "The general "rule undoubtedly is, that a trustee cannot charge the "trust estate by his executory contracts unless authorized "to do so by the terms of the instrument creating the "trust. Upon such contracts he is personally liable, and "the remedy is against him personally. But there are "exceptions to this general rule. When a trustee is "authorized to make an expenditure and he has no trust "funds, and the expenditure is necessary for the protection, "reparation or safety of the trust estate, and he is not "willing to make himself personally liable, he may by "express agreement make the expenditure a charge upon "the trust estate. In such a case he could himself ad- "vance the money to make the expenditure and he would "have a lien upon the trust estate, and he can by express "contract transfer this lien to any other party who may "upon the faith of the trust estate make the expenditure."

On a petition for rehearing they say further: "There "was at most a personal charge against the defendant. "Then, in order to transfer this charge from him to the "estate and to give plaintiff a cause of action which he "did not have, what was necessary? It could only be "done in one of two ways: first, upon an agreement based "upon some new consideration; or, second, by an assign- "ment of the lien or claim which the defendant had "upon the estate for these expenses. In such a case "where the party has done the work upon the personal "responsibility of the trustee, he can get no lien upon the

" trust estate by the mere promise of the trustee to pay " him out of the estate. There is no emergency which " then authorizes the trustee to create a lien upon the " trust estate, and all he could do would be to transfer " his."

It is not pretended here that Stephens ever paid one cent for this work in exploring for the lost vein. The men who expended the money only had a personal charge against Stephens, and Stephens assigned to the parties who expended the money.

ARTHUR BROWN,
Attorney for Appellant.

Supreme Court U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 115.

MATTHEW T. GISBORN, APPELLANT,

vs.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONN.

Appeal from the Supreme Court of the Territory of Utah.

REPLY OF APPELLEE TO SUPPLEMENTAL BRIEF FILED BY APPELLANT.

ALVAN P. HYDE,
Attorney for Appellee.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

Supreme Court of the United States.

OCTOBER TERM, 1891.

TERM NO. 115.

MATTHEW T. GISBORN, APPELLANT,

v.

THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, APPELLEE.

Appeal from the Supreme Court of the Territory of Utah.

Supplemental Brief for Appellee in Reply to the Supplemental Brief for Appellant.

I.

As to the reply to our argument upon the question whether this suit was barred by the Statute of Limitations.

The appellant cites authorities and gives various reasons in opposition to our claim that, although the indebtedness might be barred, the mortgage itself is not barred. Before replying to these suggestions of the appellant, we would first call the attention of the Court to this case as it is.

It appears by the record that on the 30th day of April, 1874, and on the 6th day of May, 1874, the appellant, Gisborn, gave two deeds to William A. Stephens as trustee, which conveyed to him the whole of the Mono Mine, Utah. On the 30th day of May, 1874, Stephens executed to Gisborn a declaration of trust, defining the trust under which he held the title by these two deeds. The deeds of April 30, 1874, and May 6, 1874, were referred to and acknowledged to be the foundation for the declaration of trust.

It was declared by Stephens that he held the property, first, for the repayment to himself of such expenses as he should incur in operating the mine; second, to repay an advance of ($400,000) four hundred thousand dollars made by him as trustee to Gisborn, to enable him to purchase two-thirds of the mine from his co-tenants; third, to hold the property until he had paid out of the income of the mine to Gisborn a sum equal to (7%) seven per cent. interest on one-third of the net product of the mine while it was being applied to the payment of the $400,000, and also until he should have paid to Gisborn the sum of ($275,000) two hundred and seventy-five thousand dollars in addition thereto.

These were the declarations of the trust, perfecting the trust deeds.

Then it was provided as follows (Record, p. 29): "As soon as said uses shall be fulfilled and discharged, I will cause said conveyance of said premises to me to be cancelled of record by doing such acts and executing such instruments as may be necessary to recover or revert the title of said premises, with the tenements, hereditaments, and appurtances thereto appertaining, to and in the said Matthew T. Gisborn, his heirs and assigns, to the same extent and estate as now held by me as aforesaid as trustee."

The plain construction of this declaration of trust, in connection with the trust deeds, is simply that the title to the property was to be held by the trustee until he had first paid off the loan or advance of $400,000, with interest. When that was done, neither he, the trustee, nor Allen, Stephens & Company, for whom he was acting, would have any further claim upon the mine or the income thereof; but for his own purposes Gisborn desired to have the trustee still retain possession of the mine until he, Gisborn, had received the amount named as interest and the $275,000, as specified in the third and fourth clauses. Then the mine itself was to be conveyed to Gisborn, but not until then. So it will be seen that, after the $400,000 had been paid, with interest, Gisborn was the sole party interested, either in the proceeds or in the fee of the mine, but he would receive nothing until after the $400,000 and interest had been paid. It was further provided (Record, p. 29) that one Adams and one Holman should be the managing agents for running the mine.

It clearly appears from the record that it was then anticipated by all parties that the product of the mine, within a reasonable period, would be sufficient to pay off the $400,000 advanced to Gisborn, and also the remaining sums which Gisborn desired to receive to himself after that sum had been paid. After a lapse of a few months, during which the mine had produced a profit of only about twenty thousand dollars, a fault in the vein was found, whereby it disappeared and the mine ceased to be productive. Thereupon, Adams and Holman ceased to act, and Gisborn was thereafter employed as managing agent in operating the mine under the trustee. For the next two years, Gisborn, as managing agent, endeavored to find the lost vein, and during that time incurred bills in the name of the trustee, which, with the

interest thereon, now amount to about ($51,000) fifty-one thousand dollars. The trustee was unable to furnish the money to operate the mine and to pay the bills thus incurred by Gisborn, and consequently called upon the Charter Oak Life Insurance Company, who by the assignment from Allen, Stephens and Company had become the first beneficiaries under the trust, to enable him so to do. The Charter Oak Life Insurance Company paid these various bills, incurred down to the year 1877, when, being unable or unwilling, they declined to pay any more money in searching for the lost vein. Thereupon, the trustee, on the 21st day of April, 1877, wrote to Gisborn, reciting the facts that the Charter Oak Life Insurance Company had furnished large sums of money to pay the bills which had been incurred by Gisborn in the name of the trustee, and that they declined to furnish any more; that there were still large claims outstanding, and suggesting to Gisborn that unless he, being the next party in interest, was willing to advance the money to continue prospecting for the lost vein, they should endeavor to get these outstanding bills into some one man's hand, so as to prevent delay and cost and the sale of the mine on execution. Gisborn on the same day replied that he was not in condition to furnish the money, and approved of the proposition of the trustee. (Record, pp. 91 and 92.)

It may here be stated that all these bills which were paid by the Charter Oak Life Insurance Company were contracted by Gisborn in the name of the trustee, and were all audited and approved by him, so that no question can arise as between this plaintiff and the appellant as to the propriety of the expenditure or the amount. After this, it appears that, with the approval and assent of Gisborn and of the Charter Oak Life Insurance Company, the mine was leased to Marshall, Royle & Clark, by two leases, one from

the first of January, 1878, to the first of January, 1879, and the other from the first of January, 1879, to the first of January, 1880.

This action was brought by the Charter Oak Life Insurance Company, the first *cestui que trust*, having a claim of $400,000, with interest, secured by the trust, against Stephens as trustee, asking that the mine be sold for the benefit of all concerned and the proceeds applied to the payment of the liens resting upon the mine according to their priority. Gisborn, having a residuary interest as a beneficiary under this trust, is made a party. Gisborn, and he alone, sets up the question of the statute of limitations—that this suit is brought too late. No claim of that kind is made and no defence of that kind is interposed by Stephens, the trustee, who alone, as we claim, would have the right to set up the statute of limitations.

Our claim is that, no matter who sets up the statute of limitations, even if Gisborn is allowed so to do, it cannot avail for the reason that the deeds from Gisborn to Stephens as trustee, to secure this advance of $400,000, in connection with the declaration of trust, constitute an express trust against which the statute does not run. It matters not whether a suit could be brought against Gisborn for the $400,000 personally or not, or whether or not a suit could be brought by the original holders upon the claims which have been paid at the request of the trustee for the working and development of the mine. The right of the appellee in this case to a decree depends solely and entirely upon the trust deeds. By the terms of the trust this was to be a continuing trust until the $400,000, as well as the expenses of operating the mine, had been realized and paid. There has been no repudiation of the trust by the trustee or any attempt on his part to avoid the payment of these claims. The trust has never

been terminated or repudiated, and consequently the statute of limitations does not apply.

A careful examination of the cases cited by the appellant in his supplemental brief fully sustains the claim of the appellee.

The decisions cited in our original brief were to the point that even though an action of law might be barred by the statute of limitations on a debt secured by a trust deed or mortgage, this would not necessarily extinguish the security. The question whether the party had a right to pursue a remedy against the security in a court of equity would be entirely independent of the question whether the debt or claim was barred in a court of law.

It is said, however, and undoubtedly true, that in California the statute of limitations extends to remedies in equity as well as at law, differing from that of many other States. But that their statute does not apply to a case of express trust like this is fully settled by the decisions of their courts.

In the case of Miles *v.* Thome, 38 California, 335:

> "The statute of limitations does not begin to run
> " in the case of an express trust until the trustee,
> " with the knowledge of the *cestui que trust*, has disa-
> " vowed and repudiated the trust."

In that case two parties built a road under a charter granted by the legislature. The defendant took charge of the road and collected the tolls. Plaintiff, after a lapse of more than four years, brought an action for account and settlement, and a conveyance of a half interest in the franchise. It was held that the statute did not apply, as there was a continuing trust.

In Hearst *v.* Pujol, 44 California, 230, see page 235:

> "If A conveys land to B, which, by the terms of the "conveyance, is to be held in trust and reconveyed to "himself or another, he thereby creates an express "trust."

And again, same page:

> "As between trustee and *cestui que trust*, in the case "of an express trust, the statute of limitations does "not begin to run until the trustee repudiates the "trust," &c.

Here the suit is between one *cestui que trust* and the trustee, seeking to appropriate the trust property for the payment of the debt, another *cestui que trust* being made a party therein.

Grant *v.* Burr, 54 California, 298.

In that case there was a deed of trust to secure two notes. In the deed of trust it was provided that the trustee might sell the property for the purpose of paying the notes. The notes became barred by statute. The trustee then proposed to sell the property and pay the notes. The grantor attempted to enjoin him. It was held that the trustee could still sell the land to pay the debt. In other words, the doctrine of California is that though a remedy may be barred at law, or even in equity, still the title of a trustee for the payment of a debt is good until the debt is paid.

In the case of Henry *v.* Confidence Mining Company, 1 Nevada, 619, cited by appellant, it was held that though the statute of California limits equity suits in the same manner that it limits suits at law, yet the fact that the debt is barred by the statute of limitations does not extinguish the mortgage, but the mortgagee, if he gets possession without

fraud or force, can maintain possession as against the mortgagor or his assigns until the debt is paid, although he could maintain no action to recover the debt.

Reed *v.* Edwards, 2 Nevada, 262, see page 265.

"But even if the statute was a complete defence to
" the note, the court below, under the ruling of this
" Court in the case of Henry *v.* Confidence Company
" (1 Nevada, 619), should have permitted a foreclosure
" of the mortgage."

In Mackie *v.* Lansing, 2 Nevada, 302, cited by respondent, the head note is as follows:

"A party holding a mortgage is not barred of his
" right to foreclose the same until four years shall have
" elapsed from the accruing of the action, although
" the statute may have barred an action at law on the
" debt before that time."

Cookes *v.* Culbertson, 9 Nevada, 199.

In that case, to secure a loan, a deed was made, absolute in form but really intended as a mortgage. The Court says (page 208):

"As the statute of limitations of this State applies to
" suits in equity as well as actions at law, the creditor
" could have enforced payment by foreclosure of the
" mortgage within four years after the cause of action
" accrued. He had two remedies—one upon the debt,
" the other upon the mortgage. By losing one, he
" does not necessarily lose the other."

So in the case of Bacon *v.* Rives, 106 U. S. 99.

In that case a citizen of Virginia sent money to a citizen of Texas to invest. After ten years had elapsed, he commenced suit against the defendant to compel him to ac-

count for the money which he had so received to invest. The defendant demurred, raising the question that the suit was barred by the statute of limitations, both of Virginia and Texas. This Court held that there was a continuing trust, and that the statute did not run till the trust was closed or repudiated.

Upon the strength of those various authorities, it is clear that in this case where there was a continuing trust, never repudiated or closed, a trust created for the very purpose of paying this debt and by its terms anticipating some lapse of time before the debt should be paid, the statute of limitations has no application. Suppose there had been no fault in the vein, and the net proceeds amounted to ($25,000) twenty-five thousand dollars a year after paying the interest and expenses, it would take sixteen years to pay off the loan. But, while the trustee was thus paying it off, could it possibly be claimed that the statute of limitations would bar the right of the plaintiff to insist upon the security of the trust deed for the payment of his loan?

II.

The second point made by the appellant is brief, and has reference more particularly to the acknowledgment by which we claim Gisborn admitted the continuance of this trust.

It is said on page 2, in relation to the leases made by Stephens, trustee, to Marshall, Royle & Clark, that "the plaintiff, Charter Oak Life Insurance Company, apparently was not consulted with regard to it, and certainly was not a party, although the assignment had been made to the plaintiff on the 12th of February, 1875 (Record, page 86), so that Stephens had no right, title, or interest in this

property at the time of making this lease, except as a mere naked trustee. All beneficial interest in it had passed from him."

What is meant by this we are at a loss to perceive. The trust had not been closed, and the trustee held all the title he ever had and was subject to the same duties.

But the appellant claims that the acknowledgment amounted to nothing, and quotes the acknowledgment at the top of page 3. If we look at the two leases (Record, pages 112 and 113), we find that the first reads as follows:

> "And as, under the trust aforesaid of said "Stephens, trustee, it is desirable that Matthew T. "Gisborn, one of the parties interested in said trust, "shall affirm and ratify the same and give evidence "thereof by an indorsement of his signature thereon, "if he deems it his interest so to do:
>
> "Now, therefore, it is distinctly contracted, agreed "and understood between the said party of the first "part and said Gisborn, that the making of this lease "shall only, so far as is specified in this lease, im- "pair or prejudice the rights or interests, or rights of "possession of either said party of the first part, or "said Gisborn, as to said mining property aforesaid, "or as to the trust aforesaid, or the declaration of "said trust, now of record. On the contrary, the "said rights, interests, and rights of possession of "said party of the first part and said Gisborn are "continued and extended to the date of the expira- "tion of said lease, and upon the expiration of this "said lease, these rights, interests, and rights of "possession shall be as valid, binding, and effectual "as they or any of them are this day."

On this, Gisborn made his written endorsement, as follows:

"In consideration of the premises aforesaid, and "for value received, I do hereby authorize, ratify, "and confirm the foregoing lease.

(Signed) MATTHEW T. GISBORN."

If any clearer acknowledgment could be made that this trust was a continuing trust, we should be glad to see in what terms it could be worded.

The second lease, commencing on the 1st of January, 1879, and ending on the 1st of January, 1880, was in substantially the same words, and endorsed in precisely the same manner, and this lease was also endorsed by the Charter Oak Life Insurance Company. Here Gisborn, in the most solemn manner, agrees that this trust is to continue until the 1st of January, 1880, for the purposes named in the trust, and that the right of possession of the trustee, Stephens, shall not be at all impaired by the making of the lease. All the parties agreed to it.

Now, Gisborn claims that the right of action against the trustee has been barred by lapse of time. Within three years after the expiration of this lease this suit was brought.

The appellant refers to the case of McCormick *v.* Brown, 36 California, 184. That case can have no bearing upon this. That was an action at law. The original cause of action was barred by the statute. The plaintiff relied upon a new promise, but only proved a conditional promise, the condition of which was not accepted or performed by the plaintiff. It was held that the new promise was not sufficient to maintain the action.

III.

The last point raised by respondent in his supplemental brief is merely a restatement of the same question raised